FILE COPY.

Office Supreme Court U. S.
FILED
FEB 8 1904
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

[redacted]

No. [redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

JOSE ANTONIO FERNANDEZ Y PEREZ, *Plaintiff in Error,* *vs.* **JOSE PEREZ Y FERNANDEZ.** *Defendant in Error.*	No. 51.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATE FOR THE DISTRICT OF PORTO RICO.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This record is an example of the looseness and confusion in judicial as well as administrative procedure that seem necessarily to attend and characterize the formative period following a change of sovereignty and the establishment in an old country of a new system of government. But it seems to present with sufficient clearness the questions to which it is proposed briefly to direct the attention of this court.

The case is brought here upon a writ of error to the United States District Court for the District of Porto Rico, and presents for review a judgment of $7,000 entered in that court on December 12, 1901, against the plaintiff in error.

The action was "trespass on the case for wrongful attachment," and was brought by the defendant in error to recover damages which he claims to have suffered as a result of an attachment writ levied, at the instance of the plaintiff in error and his co-defendant in the lower court, upon a two-story house in Mayaguez then belonging to the defendant in error. The averment is that the attachment was levied "without probable cause."

Besides some traveling and other expenses claimed by the defendant in error to have been made in preparing his defense to the attachment proceeding, the damages especially complained of by him, as a result of the attachment of his property, is the alleged impairment of his reputation and credit as a merchant. A notice of the attachment was posted on his property and this, he alleges, produced damage to his standing in his community.

The further facts in the case are as follows: The defendant in error, José Perez y Fernandez, as he admits upon this record, had owed about $6,000 pesos to one Claudio Barros. (Rec., 38.) The latter died, leaving a will in which Raphael Diaz Agueria, one of the defendants in the court below, was named as executor. The will was probated in Spain and Agueria duly appointed executor of the estate of the decedent. The larger part of the estate seems to have been located in Porto Rico, and Agueria, although a Spaniard, seems to have been a resident of that island. (Rec., 1.)

The defendant in error, Perez, without making any arrangement for paying the indebtedness due to the estate of Barros, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for $20,000 pesos. (Rec., 18.) The instrument seems to have embraced all the real estate that he owned in the island. (Rec., 51.)

This transaction came to the knowledge of the executor, Agueria, a few weeks afterwards, and as the mortgage did not contain any provision for the payment of the debt due to the estate that he represented, he took alarm and, acting under advice of counsel, caused an attachment writ to be issued and levied upon the house at No. 10 Peral street, Mayaguez, belonging to the defendant in error. (Rec., 13.) The property was included in the mortgage and the writ therefore only reached the equity in it. (Rec., 21.)

The attachment proceeding was commenced on January 2, 1900, in a military court established by the United States military authorities and called "The United States Provisional Court for the Department of Porto Rico." But beyond the serving of the usual summons upon the defendant, the levying of the writ and the posting of the notice on the premises as above alluded to, the proceeding seems to have gone no further. It was in fact subsequently dismissed, after it had been stayed by injunction proceedings in the United States District Court at the suit of one Jacinto Perez Barros, heir of the deceased Claudio Barros. The ground upon which the injunction was issued was that Agueria, the plaintiff in attachment, who sued as executor under a will probated in Spain, had not taken out ancillary letters in Porto Rico, and therefore was not authorized in the latter jurisdiction to collect by judicial process the $5,000 pesos due to the estate of the decedent.

The plaintiff in the attachment suit, Raphael Diaz Agueria, as above stated, sued as the executor of the will of Claudio Barros. (Rec., 30.) But the affidavit in attachment was sworn to by José Antonio Fernandez y Perez (Rec., 31) as the agent of Agueria, and on its face it appears that he was acting only in that capacity.

In bringing his action to recover damages for the alleged wrongful attachment the defendant in error not only made Agueria and his agent, José Antonio Fernandez y Perez, joint defendants in the action (Rec., 2), but the act complained of against them is set up as a joint tort. Summons was served on the latter, but although Agueria, as stated in the declaration (Rec., 1), was a resident of Porto Rico, the marshal's return on the summons was that he was "unable to find the within named defendant, Raphael Diaz Agueria, within my district." Nor does it appear that any further effort was made to obtain service upon him.

The agent, Fernandez y Perez, appeared by his attorneys and demurred to the declaration, which demurrer was overruled by the court. He then pleaded and the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's testimony the defendant asked for what was doubtless intended as a peremptory instruction to the jury to find for the defendant. His motion was overruled and this ruling is now assigned as error. At the conclusion of all the testimony the court instructed the jury, and although Agueria had not been served *and the cause had not been dismissed as to him*, the case was allowed to go to the jury against the agent only. A verdict in general terms—"We, the jury, find for the plaintiff $7,000 in damages" (Rec., 76)—was brought in, and judgment was subsequently entered upon it against José Antonio Fernandez y Perez, only.

On the motion for a new trial one point urged was (Rec., 24) that "the verdict of the jury has no evidence to support it and is so far contrary to the evidence as to shock the moral sense."

An examination of the record will disclose that this is not an exaggerated statement of the matter. There is some testimony by the defendant in error as to the expenditure of $1,200 pesos in traveling expenses. There was no cross-examination on this point, but in this small island of only forty miles in width and less than one hundred miles long such an expenditure seems incredible and its imposition upon the plaintiff in error a miscarriage of justice. (Rec., 46.)

After the attachment notice had been posted on the premises by the officer, contrary to the local law, which requires the writ of "provisional seizure" of real property to be filed with the registrar of deeds (Code of Civil Proc., Art. 1407, p. 281), no other step seems to have been taken by either party. The business of defendant in error was not taken charge of and he was not dispossessed. Only a notice of the attachment was posted on the premises in English in the midst of a Spanish speaking people. "It was in English," says Gonzalez (Rec., 67), "but I found out *after inquiry* that it referred to an attachment." But if the marshal had filed the notice with the registrar, as the law required, instead of posting it, it would doubtless have escaped the notice even of the inquiring Gonzalez. And it was soon defaced by the rain. (Rec., 50.) A simple motion to dissolve the attachment on the technical ground afterwards raised by a stranger to the record in a suit in equity, would have terminated the proceeding, and have removed the rain stained notice. But nothing was done by way of defense, except

that the defendant in error seems to have kept himself constantly on the road, traveling back and forth, and rolling up an extraordinary bill for traveling expenses, which subsequently were imposed upon the plaintiff in error. There is also some testimony—not explained in detail or with exactness—as to extraordinary fees paid to lawyers *"and for a great many other things"* (Rec., 46)—not explained—in connection with his defense, although the record does not disclose that the lawyers took any steps at all to relieve the defendant of the embarrassment to him arising, as alleged, from the notice in English posted on the premises.

It is apparent, however, that the case proceeded on the theory that the gravamen of the action, in the mind of the defendant in error, was the alleged damage to his reputation and credit resulting from the attachment suit against him. The limit of the claim for traveling and other expenses was $5,000. (Rec., 47.) The verdict therefore includes at least $2,000 for alleged injury to his credit and standing. And as to this issue there was practically no evidence to sustain the verdict.

It is not to be expected that this court will examine this record with a view to the reversal of the judgment on the ground that the verdict is not supported by the weight of the evidence. But as indicating the general character of the result attained by the operation of a court of justice in this case, and on the ground that there was no evidence even tending to support the contention that his reputation and credit have been injured, the writer ventures to summarize briefly the evidence offered by the defendant in error. The testimony when examined fails to a singular degree to lend the slightest support to that averment.

Mr. Bravo (Rec., 59) simply expressed the opinion that "a case like that" always affects a merchant "in some way or other." Mr. Koberg, when asked whether the credit of the defendant in error had been hurt seriously or slightly, replied, "I cannot say that. I do not know that." (Rec., 62.) Mr. Phillipi several times stated that the credit of the defendant in error was *not* hurt by the attachment suit (Rec., 63), and even when pressed by counsel stated that he did not know whether it was affected or not and that he had no opinion on the question. (Rec., 64.) The witness Koester said that his credit was hurt "just to a certain extent," but he was not able to state how much. (Rec., 65.) Mr. Font said that he was a doctor and not a merchant and did not know about such matters; but his "understanding" was that an attachment against a merchant must injure his credit. Mr. Gonzalez saw the notice on the house. (Rec., 67.) It was in English, and as he was of an inquisitive turn of mind, he took steps to ascertain its meaning and learned that it referred to an attachment. But did not venture any opinion as to its effect upon the credit and standing of the defendant in error. Mr. Ramos, when asked whether the attachment affected the credit and standing of the defendant in error, said, "I do not know, I cannot say." (Rec., 68.) When recalled in order again to testify on the same point, he said (Rec., 71): "I consider that he *must* have suffered, because when a man has his property attached necessarily he suffers in his credit. I cannot state the amount of the harm done."

These witnesses were all called by the defendant in error and no other witness testified for him on this point or on any other point. The defendant in error himself said, in relation to the alleged injury to his credit, that his partner-

ship was not injured because it never asked for credit. As to himself (Rec., 43) he said: "It is positive that my credit suffered greatly." But the only instance that he endeavors to give as a proof of the assertion is, that he wrote one Villamil & Co. for a loan of $2,000 and never got an answer. (*id.*) But he admits that he never was personally refused credit by anyone. After the Spanish speaking neighbors saw the English notice on the house "*I did not dare ask anybody*" for credit. (Rec., 43.) The attachment did not result in the presentation of bills and claims against him by his creditors. He says: "They did nothing, *but they were doubtful.*" (Rec., 50.) But the firm of Fritze, Lundt & Co. did collect a note *from his partner* that had long been overdue and unpaid. (Rec., 50.)

The record is absolutely bare of any other proof that tends even by intimation to show that the attachment did any harm to the good name of the defendant in error. And this court will not overlook the fact that the attachment was dissolved and the case dismissed not because it had been wrongfully issued—the debt was due from the defendant in error and he had by mortgage on all his real estate secured another large creditor to the exclusion of the estate of Barros—but only upon a technical incompetency on the part of the plaintiff in the action to bring suit in Porto Rico.

I.

THE COURT INSTRUCTED THE JURY ERRONEOUSLY AS TO PROBABLE CAUSE.

The rule is that the question of what constitutes probable cause is one of law or of mixed law and fact. It may be

left to the jury to determine whether certain facts exist as alleged, but it is for the court alone to determine whether those facts, if found to exist, do or do not amount to probable cause.

Stewart v. *Sonnebonne*, 98 U. S., 187.
Sanders v. *Palmer*, 55 Fed., 217; 5 C. C. A., 77.
Bulkeley v. *Keteltas*, 6 N. Y. (2 Selden), 384.
Bulkeley v. *Smith*, 2 Duer, 261.
Besson v. *Southard*, 10 N. Y. (6 Selden), 236.
Masten v. *Deyo*, 2 Wend., 424.
Baldwin v. *Weed*, 17 Wend., 224.
McCormick v. *Sisson*, 7 Cowan, 715.
Hutchinson v. *Wenzel*, 155 Ind., 49.
Sutton v. *Johnstone*, 1 Term. Rep., 493 at 545.
Panton v. *Williams*, 2 Adol & Ell N. S., 169 at 192.

On this point of probable cause it is obvious that the court left it to the jury to determine whether the defendants did or did not have probable cause for the prosecution of the attachment suit. This was erroneous. In the case of *Stewart* v. *Sonnebonne, supra*, this court said:

> "It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility and what facts it proves, *with instructions that the facts found amount to probable cause, or that they do not*. There may be, and there doubtless are, some seeming exceptions to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove probable cause is involved. What their belief was is always a question for the jury."

Judged in the light of the above language, the instruction given by the District Court was manifestly erroneous.

It did not inform the jury in the slightest degree as to what facts would amount to probable cause. It detailed the evidence tending to prove certain facts, but it did not indicate that those facts, or any of them, if true, would show that probable cause existed or did not exist. The jury should have been told "If you find that thus and so was done, and that the defendant believed this and that, then he was justified in beginning the attachment suit, but if you find certain other facts, then he was not justified." Such an instruction was given by Brewer, J., in *Blank* v. *A. T. & S. F. Ry. Co.*, 38 Fed., 311 at page 314. But the instruction in this case is very different. It says (Rec., 73, 74):

> "If, upon the other hand, if you believe that he did not act in good faith; that it was in bad faith; * * * that there were no grounds for a reasonable man to believe that the debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment. * * * It is really at last a matter for you to determine * * * not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out. * * * *If you determine that he had no probable cause for suing out this attachment*—that it was done through malice, why then you ought to find for the plaintiff whatever he has been damaged by reason of it."

The jury were asked, in effect, whether or not they thought the defendants were justified in bringing their attachment suit. Even if the plaintiff's evidence be taken as true, the question of whether or not those facts as found amounted to a probable cause, was one for the court and not for the jury. As is said by Judge Duer in *Bulkeley* v. *Smith*, *supra*, the judge "must instruct the jury that if the facts shall be found by them in a certain manner, they do or

do not amount, as the case may be, to a want of probable cause. * * * If, instead of such a direction, he leaves it to the jury to determine not only whether the facts alleged by the plaintiff are true, but, also whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error."

This was exactly what the presiding judge in the lower court did—he abjured his own functions. He let the jury determine that the facts showed a want of probable cause. His own opinion, after listening to the evidence as expressed in the record, was, that the plaintiff in error had probable cause for bringing the action in attachment and was not guilty of malicious prosecution. His remarks on the point, set forth confusedly in the record, are substantially as follows (p. 69):

> "My recollection is, that this man, in whose name the suit was brought, was appointed an executor in Spain. I take it that if the defendant here did not act maliciously but believed in good faith that there was proper cause for bringing this suit in the name of the executor and believed that he had a right to bring it—it seems to me that that is not malicious prosecution."

Although error has not been assigned on the instruction, the writer has ventured to direct the attention of the court to it because of the obvious character of the error that it involves and in order by a reference to the cases from American sources to emphasize the fact that it proceeds or was intended to proceed on common law principles and in complete disregard of the local jurisprudence.

II.

THE COMMON LAW IS NOT IN FORCE IN PORTO RICO AND THE JUDGMENT ENTERED HEREIN IS VOID FOR LACK OF JURISDICTION IN THE LOWER COURT TO ENTERTAIN SUCH AN ACTION.

It is assumed that this court will take judicial notice of the fact that the body of laws and system of local government in force in the Island of Porto Rico at the time of its occupation by the American troops were the laws and form of government enacted and established for it by the Kingdom of Spain. It is also assumed that judicial notice will be taken of the course of legislation since the occupation, with a view to determining what changes in the body of laws have taken place. It may properly be asserted therefore that the Spanish system of laws and not the common law of England was in force in that island during the Spanish dominion. And the writer knows of no statutory authority under which the common law may be said to have been extended there since the sovereignty over it was transferred to the government at Washington. On the contrary, the organic act expressly provides that the local laws shall continue in force.

If therefore, as appears clearly upon this record, the United States District Court for the District of Porto Rico, in cases that come before it, is enforcing the principles of the common law in that island without statutory authority and in disregard of the local jurisprudence, the question of its power to do so would seem to belong to that class of jurisdictional questions that may be raised in this court either by the parties to the proceeding or by the court itself, although

not raised in the lower court or preserved by exception upon the record. Such a question seems to be entirely analogous to the questions of jurisdiction suggested for the first time on appeal in

Smith v. *Rice*, 11 Mass., 507, at p. 513.
Riley v. *City of Lowell*, 117 Mass., 76.
Fowler v. *Eddy*, 110 Pa. St., 117.
State v. *Richmond*, 6 Foster's Rep., 239.
Mansfield, etc., R. R. Co. v. *Swan*, 111 U. S., 379.
Campbell v. *Porter*, 162 U. S., 478.
Morris v. *Gilmer*, 129 U. S., 315, and in similar cases.

The point is now made therefore, that the lower court in entertaining this form of action and in hearing and deciding the issues between the parties in accordance with the principles of the common law of England and in disregard of the local laws, pleading and practice, then in force, was exercising a jurisdiction that did not belong to it, and the judgment rendered was therefore void and should be set aside.

In presenting this question to the court it seems proper first to allude briefly to the character of the local jurisprudence.

The penal and civil codes of Spain and codes of civil and criminal procedure, its celebrated mortgage law and law of notaries, together with the code of commerce and law of waters, and its provincial and municipal systems of local government, form a jurisprudence and a system of administration as highly refined as those enjoyed by any of the civilized nations. Under these laws an organized social and political life was maintained in Porto Rico, and foreign and domestic commerce was sustained on a stable basis.

The foundation of the Spanish codes was of ancient origin and in their present form, as promulgated in 1889 for Spain and its colonial possessions, they were the result of generations of experience and were thought to be especially suited to the temperament and condition of Spanish speaking people whether living in the Peninsula or in its colonies. They were the product of the history, traditions, education and environments of Spaniards. And from an academic standpoint they had established for themselves a high place among students of jurisprudence. Mr. Leve, an eminent French jurisconsult, who recently translated the Spanish civil code into French, upon a comparison between it and the Code Napoleon, reached the conclusion that the former was the more scientific and complete. (See Note page 107, Walton's Civil Law of Spain.)

And the Congress of the United States, recognizing the completeness of the Spanish system of laws then in force in Porto Rico, and believing that they were well adapted to the conditions there existing, provided, in the Act of April 12, 1900, establishing a civil government for the island, that they should continue in force until changed by the local legislature.

But although the local legislative assembly is clothed with power by due enactment to amend, alter, modify or repeal any law or ordinance, civil or criminal, that is continued in force by the organic act (Sec. 15), nevertheless, so far as the general body of municipal law is concerned, neither Congress nor the military authorities nor the subsequent insular legislative assembly has made any substantial change. For convenience and to relieve the budget of unnecessary burdens, the American military authoritites, by military order signed by the general in command, legislated certain officials and

boards out of existence and modified and re-arranged the jurisdiction of certain other officials and official bodies. There was also some military legislation of a general character tending to simplify government and to prepare the people for the establishment by Congress of a form of government more in harmony with American traditions. But the laws of property and the general laws that controlled the daily life of the people and their relations with one another were left substantially unchanged and remain so to this day.

The legislative assembly, however, has not been inactive in the adoption of institutions and systems recognized as typically American in character. It has provided, for instance, a general system for the taxation of real property substantially on lines familiar to all property owners in the states and territories. It has enacted a general election law. The laws in relation to public schools have been reformed and municipalities have been authorized to levy taxes for school purposes. New police and sanitary measures have been enacted; and laws are to be found on the statute books prohibiting gambling in its various forms, and providing for the closing of commercial establishments on Sunday. A lawful rate of interest has been established and a new law for the incorporation of companies enacted. The right of a trial by jury has been granted. A political code has been adopted defining and limiting the powers of the executive branch of the government. And since the action now before this court was instituted, a new penal code and code of criminal procedure of American origin have been adopted; the civil code has been re-written with certain but unimportant amendments. Moreover, a new code of civil procedure of American origin is at this moment under consideration by

the legislative assembly. The people of Porto Rico have therefore shown a commendable zeal and promptness in adapting themselves and their laws to the new conditions. But, as heretofore indicated, the body of the Spanish laws touching real property and the rights of persons and things; in other words, those laws upon which property and personal rights are based and which govern the individual in his daily life and intercourse still remain practically as they were during the Spanish dominion.

An examination of pages 1 to 298 of the volume published in 1902 and known as the "Revised Statutes and Codes of Porto Rico," will disclose the new law referred to above, enacted, as heretofore explained, in the interest of public health and in relation to elections, education, cemeteries, police courts, jury trials, insular police, municipalities, public property, appropriations, etc., etc. But with the exception of the act establishing a lawful rate of interest, the Revised Statutes show practically no amendment of the old Spanish law or any new enactment affecting the contractual or commercial or personal relations of citizens and residents of the island.

It thus appears that there has existed and still exists in the Island of Porto Rico an elaborate and complete system of laws under which the people of Porto Rico, at the time of the American occupation, were and are now sustaining an organized community in all its various phases. These laws enter into and form an intimate part of the daily life of the people and control and regulate their intercourse among each other. The merchants and property owners and others are familiar with them and relations between citizens are adjusted and controlled by them. Moreover,

the Spanish code of civil procedure, together with the code of criminal procedure, with apparently unnecessary elaboration, afford ample means by which citizens of Porto Rico and all persons residing within its jurisdiction may have their wrongs redressed, whether committed against property or the person, and may assert and enforce their rights and demands. Thus in the Island of Porto Rico, which has been wholly free from those local disorders that have occurred and still do occur with such frequency among other Spanish speaking people, there has existed and still exists a system of justice complete in all its details. And so satisfactory has this system been to Porto Ricans and to aliens dwelling in the island, that the legislative assembly, created for it by the Congress and clothed with full legislative powers, has left the laws practically unaltered, so far as they touch the individual person, property rights and commercial relations.

But the United States District Court for the District of Porto Rico seems practically to have discarded the local body of laws as an aid and guide in the administration of justice between litigants that invoke its jurisdiction. Its processes, its pleading and practice, and its judicial conclusions are founded upon unwritten laws wholly unknown to the Porto Ricans, who are accustomed only to the *written* law as found in the various codes enacted by the Spanish authorities. When brought before the Federal Court citizens of Porto Rico are told that their controversies—on the law side as distinguished from suits in equity, which, of course, stand on a different footing—are to be adjusted in accordance with the principles of the common law of England. In other words in the case now before this court, a controversy between two Spanish speaking

residents of Porto Rico had to be litigated in accordance with the unwritten law of English speaking people, the principles of which are to be found only in court reports and law books printed in a language unknown to them.

The legal authority for this course, ~~of~~ or the practical motive for its adoption, contrary to the practice of Federal courts in the States, have never been explained to Porto Ricans, so far as the writer has been informed. Nor can they understand why a system of law unknown to them should be imposed upon them. Unfamiliarity with the civil law on the part of the presiding judge of the lower court may suggest the explanation, but it affords no excuse or legal authority for causing a whole people to stand in awe of its process and to remain helpless when brought before it, because the rules and principles of this law are locked up in a multitude of books printed in a language that they cannot even read. The local Spanish laws, on the contrary, are all available in English, and in each of the five insular trial courts is an American judge of common law education and training. Two members of the insular Supreme Court are Americans. These judges have found no difficulty in administering justice in accordance with the local laws in force. And a growing American bar practices before the insular courts with ability and success. Nor have the American officials of the insular government or a large American population had any trouble in adjusting themselves to the local system.

The result of this state of affairs in the United States District Court for the District of Porto Rico is that the native bar of Porto Rico, which includes in its ranks many members of wide cultivation and learning, is practically excluded from representing its own people in that court.

And two systems of law, based upon different principles and often producing widely different results, as in this case, are enforced by the insular and Federal courts.

All the pleadings appearing upon this record and all the orders, forms and proceedings are drawn in accordance with the requirements of the common law, or were so intended. The charge of the court to the jury is based upon common law principles although erroneously stated. He explains to the jury that the action is "styled in the law book *an action upon the case.*" (Rec., 72.) This form of action is unknown in the local practice, and the law books referred to are legal treatises upon the common law of England and have no relation to the laws of Spanish origin then in force in the island and then controlling these two Spanish litigants. He instructs the jury (Rec., 72, 73) as to "probable cause" and "implied malice" exactly as if the cause of action had arisen in England or in the State of Illinois or in the District of Columbia, where the common law is in force. Moreover, the record indicates (p. 16) that the lower court entertains actions in replevin. Other official publications of Porto Rico show that it issues writs of garnishment (1 Op. Atty.-Gen. of P. R., 159), which is commonly understood to be a statutory remedy. It issues writs of attachment, also a statutory writ. But neither of these writs is authorized or known in the local laws, although they contain elaborate and ample provisions for accomplishing the same general results.

The archives of this court doubtless contain records in other cases showing the exercise by the lower court of a general common law jurisdiction. At any rate, it is the common knowledge of those that have had opportuntiy to know, that the United States District Court for the District of

Porto Rico, in all cases that come before it, not of an equitable nature, exercises a common law jurisdiction exactly as do the Federal courts in common law states like Illinois, and that in so doing it practically excludes from consideration not only the local system of pleading and practice, but also the principles that underlie the local system of laws. It entertains all the ordinary actions, whether of common law or statutory origin, as if the court sat in a common law state. The statement is made with all proper reservations, but it is the recollection of the writer that it has entertained jurisdiction in actions to recover damages for personal injuries at a time when no such civil action was possible under the local law.

Although it has been intimated that the Kentucky statutes are the *vade mecum* of the learned judge who presides in the lower court, the writer ventures no conjecture as to the source of his authority for issuing writs of replevin, garnishment and attachment. Certain it is that they are not issued out of that court in conformity with the local law, which have elaborate provisions for accomplishing the same results. So far as attachments are concerned, under Section 915 of the Revised Statutes of the United States, the Federal Courts seem to have no authority to issue such writs except by the adoption of the attachment laws of the state in which they hold court. And the "provisional seizure" law in force in Porto Rico is a most admirable and complete attachment act. (Code Civil Proc., Title XIV, p. 278.)

Now, is there any authority in law for the adoption by the United States District Court for the District of Porto Rico of the common law system of pleading and practice and for the enforcement of the common law as the basis of the

exercise of its judicial functions? The organic act provides (Sec. 8, Act of Congress of April 12, 1900):

> "That the laws and ordinances of Porto Rico, now in force, shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by Act of Congress of the United States."

The same act provides in section 14, as follows:

> "That the statutory laws of the United States *not locally inapplicable*, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico."

And in section 34, creating the United States District Court for the District of Porto Rico, it provides that it shall have,

> "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and *shall proceed therein in the same manner as a circuit court.*"

The effect of the provisions of section 8 seems undoubtedly to be to fix the local laws as the sole basis of all rights and remedies, not of a Federal character, arising in Porto Rico, in whatever court they may be asserted, exactly as the jurisprudence of any state of the United States is the basis for the enforcement, in the Circuit Courts of the United States, of all similar rights and remedies arising therein.

And with equal confidence it is asserted that one effect of sections 14 and 34, above quoted, is to extend to Porto Rico all the Federal laws that limit and define and otherwise relate to the Federal Judiciary and to require the United States District Court for the District of Porto Rico, in all civil actions that come before it, to proceed in conformity with local laws, exactly as it would be compelled to do if sitting as a United States Circuit Court in a state of the United States. No other meaning can be attributed to the language of these sections. And it is not conceivable that the Congress of the United States intended or has made it possible for the Federal court sitting in that island to impose upon the people of Porto Rico not only a system of pleading and practice with which they are entirely unfamiliar, but to impose upon them principles and precepts of a system of law entirely different from that in force in their own local courts. Such a course might have been appropriate in the early days of the western territories when their population consisted of frontiersmen, hunters and Indians. And, Congress having created a court to administer civil justice in such a territory, it might be said, in the absence of any other provision by Congress relating to the matter and in the absence of an adequate local system of laws, practice and pleading to which such a court might conform, to have an inherent power to adopt some system in order to pursue and carry out the ends of justice for which it was established. But if such an inherent power would exist under such conditions, it is earnestly contended that Porto Rico is not a proper place for its exercise. For it is not a pioneer country, sparsely settled, like Alaska and some of the western territories in which the local laws are of an elementary and simple character. On the contrary,

for some generations it has had a dense population, all the walks of life being filled to overflowing. Its commercial and agricultural enterprises are conducted on a large scale; its schools and hospitals are numerous; its banks are well organized, and its commerce and trade well established. It not only has a larger population than some of the states of the United States, but the community and its public institutions are organized on a much broader basis than in many of the states. And its system of laws is much more full and elaborate and more carefully co-ordinated than those of almost any state of the United States.

Moreover, if such inherent power can be said to exist in a court created for a territory sparsely settled and without established institutions and laws—and this need not be denied—clearly such a power cannot be exercised when Congress has affirmatively determined, as it has for Porto Rico, that the local system of laws is adequate for all purposes, and has affirmatively provided, as hereinabove stated, that all the local laws and ordinances shall continue in force. (Sec. 8, *supra.*) This means not only that the local laws and ordinances shall be respected by the people of the island and those dwelling within it, but that they shall be respected by the United States District Court as well. And this affirmative declaration by Congress of the sufficiency of the local system of laws and this provision that they shall continue in force would seem necessarily to withhold from that court any inherent power of setting them aside and substituting another system in their place. The people of the island should be relieved from the hardship and embarrassment that daily follows from the application and enforcement in that court of a system of law with which they

are wholly unfamiliar and whose precepts and rules are not to be found in a language that they can now read.

The language of the section of the Foraker Act creating and referring to the United States District Court for the District of Porto Rico, would seem to leave no doubt in the mind that the intention of Congress was that that court should bear to Porto Rico the same general relation that the Federal courts do to the several states in which they sit, and to perform the same general functions, and to have the same general though slightly enlarged jurisdiction. That being so, it seems impossible to arrive at the conclusion that, under section 14 (*supra*), the lower court is not governed by the sections of the Revised Statutes that relate to and control the Federal Judiciary in all their functions. Those sections of the Revised Statutes are not "locally inapplicable" from any point of view that has yet been suggested by anyone.

Section 914 of the Revised Statutes of the United States provides that:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, *shall conform*, as near as may be, to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*"

And although all the local laws and codes of procedure have been officially translated into English by the government at Washington, and are therefore readily accessible and are now in constant daily use in the insular courts by American officials, judges and lawyers, the United States District Court has discarded them, and as heretofore stated, permits its jurisdiction to be invoked in civil causes only upon common law principles and in common law actions or in

statutory actions ordinarily provided in common law states, and upon common law pleadings and in accordance with the common law practice. There is not only no conformity to local practice, pleadings, modes and forms, but there is no pretense of an effort to conform. The lower court in the causes before it does not "proceed therein in the same manner as a circuit court," as required in Section 34 of the Foraker Act. It pursues a course of its own without an effort at conformity "as near as may be" or otherwise.

It seems proper at this point to consider the particular case presented by this record for the purpose of ascertaining the difference between the results that followed the application of the common law and the results that would have followed had the local law been applied.

As heretofore indicated, the law of torts is a branch of purely *civil* remedial justice of limited application in the Spanish jurisprudence, although there is in the Civil Code of Spain a certain modified recognition of the principle that a wrong done creates an obligation to recompense the person injured. The provision of the *civil* code in force in Porto Rico at the time involved in this record is as follows (see War Dept. Trans., p. 244):

> "Art. 1902: A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to *repair* the damage done."

This seems to be the only general clause authorizing damages in a *civil* action for what in the common law is called a tort. In Chap. 3, Tit. 18, at p. 252 of the same translation, will be found a statute of limitations in which the several different clauses of civil actions under the Spanish code are enumerated and the time prescribed during which they may be instituted. The only form of civil action appearing in

this enumeration, under which such a wrong as the one alleged upon this record may be redressed, is the one referred to in Art. 1902 (*supra*). The chapter of which it is a part is entitled "Obligations Which Arise From Fault or Negligence," and pertains to Book IV of the Civil Code (p. 145). This book treats altogether of "obligations" in their various forms, whether created by law, by contract, by unlawful acts or omissions or by negligence or fault. And in case of damage resulting from an act or omission not punished by the penal law, Art. 1093, p. 145, provides that the claim of damages shall be subject to the provisions of Art. 1902, referred to and quoted above. That article, therefore, seems to be the only clause in the *civil* code that has relation to such a case as this record presents. And it provides only for the "*repair*" of the damage done.

The writer has been unable to find available here for reference the Spanish treatises relating to the subject, and he has therefore expressed his views in these pages with some reservation. It is believed however that it will be found to be a well settled doctrine in the Spanish jurisprudence, that damages may be recovered in an exclusively *civil* action only when the injury done is of a *material* character capable of being definitely valued, and then only when it is the immediate and necessary result of the negligence or wrongful act complained of. In such a case the damage must be "*repaired.*" In plain English it must be "made good." For example, a wagon destroyed or a house injured through negligence must be restored by the careless author of the damage or the cost of its restoration must be paid for by him. Again, a person physically injured in an accident due to negligence, may recover the value of his suit of clothes or money or other property on his person destroyed

or lost *in* the accident. He may recover the money *actually expended* by him after the accident for medical attendance and drugs. He may recover for any other damage of a *material* nature that is capable of being exactly valued and was the ~~material~~ result of the injury. But for the loss of his limb or injury to his health or similar resulting consequence of the negligence, which is not capable of exact and definite valuation, the *civil* action alone is not sufficient to afford him redress. The Spaniard resents the theory that his leg may be valued in a merely civil proceeding and a money compensation awarded to him for its loss without a criminal prosecution. He resents the theory that he has a *civil* action for damages for the death of a member of his family through the negligence of another. The person guilty of negligence producing results so grave must be punished criminally. And he entertains the same objection to a money valuation in a civil action for damages to his reputation or dignity through the wrongful act of another. If a slander or libel or, as expressed in the Spanish laws, a calumny or insult, results in the loss of a definite employment to which is attached a definite salary, he may recover damages under the Spanish code in a civil action. But for the indefinite damage to his reputation, credit or standing in the community not capable, like an employment with a salary attached, of exact valuation, a *civil* action alone will not suffice. Another illustration of the same principle will be found in Article 44 of the Civil Code (p. 11), which limits damages in actions for breach of promise of marriage to the actual expenses incurred by the disappointed party by reason of the promise. For the indefinite damage to the feelings, reputation, etc., the civil code offers no redress.

With respect to libel and slander the Spanish law during

the time involved in this record, did not permit a *civil* action to recover damages for injured reputation, credit, etc. Subsequently it was modified by the legislative assembly of Porto Rico, in an act entitled "An act authorizing civil actions to recover damages for libel and slander," approved Feb., 19, 1902. (Rev. Stat. of P. R., p. 214.) The first section of this act provides that:

> "The *civil* action for damages for libel and slander *is hereby established.*"

This language is important as indicating the legislative understanding of the general absence from the Spanish jurisprudence of what in the common law is known as an action in tort.

Substantially the same language is found in Section 3 of the act entitled "An act in relation to the liability of employers for injuries sustained by their employes while in their service." Approved March 1, 1902. (Rev. Stat. of P. R., 150.) Until the passage of this act there was no *civil* action under the laws in force in the island for the recovery of damages for personal injuries or death resulting from the negligence of another. There was only a civil action, as hereinbefore indicated, for damages of a material nature capable of definite valuation, such as the loss in the accident of a suit of clothes or a watch, or other wearing apparel. The intangible, indefinite damage to the person injured, resulting, for example, from the loss of a leg or arm, or the permanent impairment of his health and strength, could only be adjusted as an incident to a criminal prosecution. And that the civil action for damages for personal injuries involved a new principle in Porto Rico, will readily appear from an examination of the act itself, which is characterized by a conservatism and caution in establishing the action and

in keeping it within reasonable limitations that does much credit to the insular legislature. The two acts mentioned establishing civil actions for damages for libel and slander and personal injury are the only exceptions that the writer now recalls to the general statement hereinabove made that the general body of Spanish laws has not been materially altered since the American occupation.

The theory of the Spanish law seems to be that injuries that result in damages of an indefinite and intangible nature incapable of exact valuation, such as the loss of a limb, death of a member of the family, impairment of health, strength, credit, dignity, honor, reputation and the like, are so grave as to require the criminal punishment of the author as the primary consideration, and as an incident to the criminal proceeding the person causing the injury, *if found guilty criminally,* may, apparently, as a sort of additional penalty, be required to indemnify the person injured. Such injuries are included in the criminal code as acts to be punished like crimes and misdemeanors. And in order to recover damages it is absolutely necessary under the Spanish law that the author *must first be found guilty in the criminal proceeding.* It is referred to in the penal code as a civil liability, but it is an incident only to the criminal proceeding (Art. 650, p. 157, Crim. Proc.), and cannot be adjudged against the author of the damage except in the criminal proceeding, and only after the existence and punishable character of the act has been judicially determined.

Article 1092 of Book IV (*Civil* Code, p. 145),[1] treating of obligations, provides:

"Civil obligations, arising from crimes or misde-

1 All the references here made to Spanish Codes are to the official War Department translations.

meanors, shall be governed by the provisions of the *penal* code."

And even when the injuries are caused by negligence and not by a malicious and intentional act, if they impair the health or reputation, or result in the loss of life or limb or in any intangible harm of that nature that cannot be exactly valued, the gravity of the result seems to require punishment in a criminal proceeding and, as an incident to it, the adjustment of the damages to be paid the injured person.

With reference to acts not essentially malicious or criminal the provision of the Spanish *penal* code (Ch. *"Misdemeanors* against the person," pp. 125-7) is as follows:

> "Art. 613: The following shall be punished with a fine from 15 to 125 pesetas and censure * * * 5. Those who, *through mere imprudence or negligence,* without committing a violation of the regulations, shall cause an injury which, *if done with malice,* would constitute a crime or misdemeanor."

This provision defines as an act punishable criminally, as a misdemeanor, what in the common law would be a mere tort. And the lower court, in charging the jury that in the absence of probable cause the law would *imply malice* on the part of the plaintiff in error in suing out an attachment writ, was describing what in the Spanish law would seem to be punishable like a crime. (Art. 613, *supra.*)

Again, at p. 129, the *penal* code classifies as an act punishable criminally, as a misdemeanor, what in common law would be a mere tort. The provision is as follows:

> "Art. 626: Those who intentionally *or through negligence or carelessness* shall cause any damage whatever not punished in this or the preceding book, shall be punished with a fine, etc."

(Neither of these two articles is intended to cover *reckless* negligence, which is treated of in Art. 592.)

The Spanish law provides (Penal code, p. 17):

> "Art. 16: Every person criminally liable for a crime or misdemeanor is also civilly liable."

And so every conviction for murder, theft, arson, slander, negligence, etc., as a matter of course is attended by an additional penalty in the way of damages awarded to the injured person. It is included in the judgment entered in the criminal proceeding (§§ 4 and 5, Art. 142, p. 51, and Art. 742, p. 182, Crim. Proc.) and is enforced by execution like a civil judgment. (Art. 133, Penal Code.) But this civil liability is of such nature that it can be demanded only as an incident to the criminal proceeding. The civil demand must be brought jointly with the criminal action (Art. 108, Crim. Proc.), and if the defendant is acquitted of the criminal charge the judgment absolves him necessarily and as a matter of law from the civil liability also. On the other hand, if the defendant be found guilty of the criminal charge, the civil liability follows as a matter of course.

It will thus be seen that at the time when the attachment writ complained of in this record was issued there was no such thing in Spanish jurisprudence as a *civil* action sounding in tort, except with respect to injuries of the material nature hereinbefore referred to. And when the lower court entertained this civil action to recover damages for injury to the credit and standing of the defendant in error it simply legislated into existence a form of legal liability that was unknown in Porto Rico and that was thoroughly opposed to the policy of the local jurisprudence. And it is believed that in all the history of Spanish judicial activity no such judgment as the one here involved will be found. The defendant in error in a civil action in the form required by the local law might have recovered proper traveling ex-

penses and possibly lawyer's fees. These could be definitely ascertained, although no effort to do so has been made in this case. But for the indefinite and intangible damages arising from the alleged injury to his standing and credit the local law afforded him no redress by an exclusively civil action such as this record presents.

Formerly it was held in England that if the crime amounted to a felony, the civil remedy of the injured person was merged in the felony, or, as stated in *Higgins* v. *Butcher,* 1 Yelv., 89, referring to the death of a servant from assault:

> "It has now become an offense to the crown, being converted into felony, and that drowns the particular offense and private wrong offered to the master before (the death); his action is thereby lost."

This theory seems afterwards to have been abandoned and in its place was substituted the rule that the trial of the civil action must be suspended until after the offender has been prosecuted for the felony. Lord Ellenborough said in *Crosby* v. *Leng,* 12 East., 409:

> "The policy of the law requires that before the party injured by any felonous act can seek civil redress for it, the matter shall be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject-matter of a criminal prosecution."

In the United States however it seems that the rule requiring the offender to be tried before a civil action is allowed has not been generally accepted, the conclusion now

reached being that the civil remedy is in no way dependent upon the criminal prosecution.

Quimby v. *Blackley*, 63 N. H., 77.
Hyatt v. *Adams*, 16 Mich., 188.

But under the Spanish law in force in Porto Rico at the time here involved, the civil liability was so far dependent upon the criminal proceeding that it not only could not be determined in advance of the trial of the offender, but, as heretofore shown, civil damages could not be awarded against the person charged except upon his conviction in the criminal proceeding; and if acquitted he was absolved from any civil demand.

If this liability be considered as a purely civil obligation, it nevertheless does not become such, under the Spanish law, until the act itself has been judicially determined to exist and to be punishable under the penal code. Such determination must precede either the legal existence of such a liability or any attempt to enforce it. If found to be not punishable there is no civil liability; if punishable the civil liability follows as a matter of course. Such was the law in force in Porto Rico at the time in question, and it must be recognized by the Federal court.

Section 721 of the Revised Statutes of the United States, which is not "locally inapplicable," provides:

> "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in which they apply."

It matters not that the policy of the law of Porto Rico differs from the law of torts commonly in force in the states of the United States. Such difference does not permit the

lower court to set aside the federal statute just cited and by judicial action to legislate into the jurisprudence of Porto Rico a new principle of law. As was stated in *Hartford Fire Insurance Company* v. *Chicago, etc., R. R. Co.*, 175 U. S., 91, at p. 100, questions of public policy affecting the liability for acts done, are governed by the laws of the state as expressed in its own statutes, unless contrary to the constitution, or to some federal statute of controlling force.

It may be contended however that if the United States District Court for the District of Porto Rico endeavors to conform to the local law with respect to acts resulting in injuries to others, it will be ousted of its jurisdiction in cases where the requisite diversity of citizenship exists. For obviously that court cannot enforce the penal code of Porto Rico. It cannot convict under the insular penal code and then proceed as the insular courts would do, to ascertain the amount of damages to be adjudged. And if the civil liability, so-called, is dependent upon a previous adjudication that the act complained of is punishable under the penal code, it may be said that the lower court could never administer justice in cases that otherwise would properly be before it. It is not necessary, however, to pursue this question to its ultimate analysis and to ascertain whether the so-called civil liability is purely criminal or purely civil. If purely criminal it does not come within the jurisdiction of the lower court. If purely civil in character, the United States Distrial Court for the District of Porto Rico in taking jurisdiction and administering justice between the parties, could at least first determine that the act resulting in the injuries complained of is such an act as would be punishable under the penal code of Porto Rico. It could determine this not with a view to the criminal punishment of the author of it,

but for the purpose of ascertaining whether a civil liability exists. If not so punishable under the law in force no civil liability could be adjudged against the defendant; if so punishable, the lower court could proceed to ascertain the extent of the damages to be awarded. The failure of the lower court in some form to judicially ascertain whether the act complained of upon this record occurred and was of such character as to render the author of it liable to punishment under the local penal code, leaves undecided the question of essential importance, under the well established policy of the law, for determining whether a civil liability exists. This question was not considered upon this record. The lower court was exercising a common law jurisdiction in this case as in all others, and the local law had been set aside as not controlling in that court.

There is one other phase of this question of the failure of the lower court to enforce the local laws and the substitution in their place of the common law that must be referred to briefly.

There seems to be no federal attachment act, but under section 915, U. S. Rev. Stat., plaintiffs are entitled to the same remedies by attachment in the Federal courts that they would be entitled to if suing in a state court. And the Federal courts are given power by general rules to adopt the state laws in relation to attachment.

Now, as has been stated before, section 1 of Title 14 of the Spanish Code of Civil Procedure, p. 278, entitled "Provisional Seizures," is in fact an elaborate and effective attachment act. Among other of its provisions there will be found in article 1411, p. 282, one under which the court, upon vacating an attachment for a cause such as the one involved in this record, has the power, in the attachment

proceeding, to award a judgment against the plaintiff for costs and for the losses and damages that he may have suffered.

This provision in the article last quoted is not permissive only, but seems to be mandatory, and the power conferred by it resembles very closely the power enjoyed by a chancellor of entering a decree for damages upon the dissolution of an injunction. This article in the local law seems to be entirely adequate for adjusting any demand for damages of the character claimed by the defendant in error in this case. The law provides that the adjustment shall be made in the proceeding itself and be included in the ruling vacating the attachment. Articles 1413 and 1414 contain provisions of the same general nature. In addition it is provided in section 933 U. S. Rev. Stat. that attachments shall be dissolved in conformity with the local laws.

Here then was a provision in the local law apparently intended to permit the court, as upon the dissolution of an injunction, to ascertain and award damages upon vacating an attachment. And there seems to have been no other exclusively civil action or process for recovering damages. But the jurisdiction of the lower court under this provision of the local law was not invoked when this attachment was vacated. The whole attachment act and the entire local system of laws are disregarded in that court and the common law and statutory actions generally provided in common law states are followed instead.

The judgment should be reversed.

Respectfully submitted.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 2 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ,
Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ,
Defendant in Error.

No. 1.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF PORTO RICO.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR. FILED PURSUANT TO ORDER OF DECEMBER 5, 1904.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSÉ ANTONIO FERNANDEZ Y PEREZ,
Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ,
Defendant in Error.

No. 1.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

ADDITIONAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

This case was brought here upon a writ of error to the United States District Court for the District of Porto Rico. Briefs were filed and the case was orally argued before this court during the fall of 1904. Subsequently on December 5, 1904, an order was entered as follows:

> No. 6 *Jose Antonio Fernandez y Perez, plaintiff in error, v. Jose Perez y Fernandez.* Counsel are requested to submit additional briefs on these points:
>
> 1. Can this court, on the record of this case,

properly consider and determine the contention of plaintiff in error that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?

In compliance with the direction of the court this additional brief has been prepared on behalf of the plaintiff in error. For greater convenience and in order that the whole matter may be presented under one cover, the facts in the case are here re-stated and the particular points upon which the court now desires further information are discussed in the sequence directed by the court. Such parts of the original brief for the plaintiff in error as relate to the special questions propounded by the court are incorporated herein.

STATEMENT OF FACTS.

The result of the trial in the lower court was a judgment for $7,000 against the plaintiff in error, entered in that court on December 12, 1901.

On the pleading and service papers the action is styled "trespass on the case for wrongful attachment." It was brought by the defendant in error to recover the damages which he claimed to have suffered as a result of an attachment levied nearly two years previously upon property belonging to the defendant in error at the instance, as alleged, of the plaintiff in error and his co-defendant in the lower court, Raphael Diaz Agueria.

Besides some traveling and other expenses claimed by the defendant in error to have been incurred in preparing his defense to the attachment proceeding, the damage especially complained of by him, as a result of the attachment of his property, is the alleged impairment of his reputation and credit as a merchant. A notice of the attachment was posted on his property by the court officials, and this, he alleges, injured his standing and credit in his community.

In the attachment suit Agueria sued as the executor of the will of one Claudio Barros. (Rec., 30.) But the affidavit attached to the declaration was sworn to by Fernandez,* the defendant in error (Rec., 31), as the

*The plaintiff in error is Fernandez y Perez, the defendant in error, Perez y Fernandez. To avoid confusion in names so much alike and in conformity with the Spanish custom of using the first patronymic in informal discourse, the plaintiff in error is referred to in the pages as Fernandez and the defendant in error as Perez.

agent of Agueria. He had been employed by Agueria in connection with the property of the estate of the decedent. On the face of the affidavit for attachment it appears that Fernandez was acting only in that capacity. But in bringing his subsequent action to recover damages for the alleged wrongful attachment, the defendant in error joined Fernandez as a defendant with Agueria. (Rec., 2.) The wrongful attachment of his property was set up in the declaration as a joint tort by the two defendants. Summons was served on Fernandez, but although Agueria, as stated in the declaration (Rec., 1), was a resident of Porto Rico, the marshal's return on the summons was that he was "unable to find the within named defendant, Raphael Diaz Agueria, within my district." It does not appear that any further effort was made to obtain service upon him.

The agent, Fernandez, appeared in the action by his attorneys and demurred to the declaration, which demurrer was overruled by the court. He then pleaded and the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's testimony the defendant requested what was doubtless intended as a peremptory instruction to the jury to find for the defendant. His motion was overruled. At the conclusion of all the testimony the court instructed the jury. And although Agueria had not been served *and the cause had not been dismissed as to him*, the case was allowed to go to the jury against the agent only. A verdict in general terms—"We, the jury, find for the plaintiff $7,000 in damages" (Rec., 76)—was brought in, and judgment was subsequently entered upon it against Fernandez only.

The further facts in relation to the attachment, on account of which the judgment for $7,000 was rendered against Fernandez in the subsequent action in trespass, were as follows: Perez, the defendant in error, prior to the action in attachment instituted against him, as he admits upon this record, was owing about 6,000 *pesos* to Barros. (Rec., 38.) The latter had died in Spain, leaving a will in which Raphael Diaz Agueria, one of the defendants in the court below, was named as executor. The will was probated in Spain and Agueria was there duly appointed executor of the estate of the decedent. The larger part of the estate seems to have been located in Porto Rico, and Agueria, although a Spaniard, seems to have been a resident of that island. (Rec., 1.)

The defendant in error, Perez, without making any arrangement for paying the indebtedness due from him to the estate of Barros, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for 20,000 *pesos*. (Rec., 18.) The instrument seems to have embraced all the real estate that Perez owned in the island. (Rec., 51.)

A few weeks after its date this transaction came to the knowledge of the executor, Agueria. As the mortgage did not contain any provision for the payment of the debt due to the estate that he represented, Agueria took alarm and, acting under the advice of counsel, caused the attachment proceeding to be commenced against Perez, the defendant in error. The writ of attachment was issued and levied upon the house at No. 10 Peral street, Mayaguez, belonging to the defendant in error. (Rec., 13.) This property

was included in the mortgage and the writ therefore only reached the equity in it. (Rec., 21.)

The attachment proceeding was commenced on January 2, 1900, in a military court established by the United States military authorities. It was called "The United States Provisional Court for the Department of Porto Rico." But beyond the serving of the usual summons upon the defendant and the levying of the writ by posting on the premises a notice of the attachment, the proceeding seems to have gone no further. It was in fact subsequently stayed by injunction proceedings in the United States District Court at the suit of an heir of the deceased Barros. He raised the point that Agueria, who sued as executor, had qualified as such in Spain, where the will was probated, and had not taken out ancillary letters of administration in Porto Rico. He contended therefore that as such executor Agueria was not authorized in the latter jurisdiction to collect by judicial process the 6,000 *pesos* due to the estate of the decedent. The court so held and enjoined any further steps in the attachment proceeding.

After the attachment had been made, no other step seems to have been taken by either party to the action. The business of defendant in error was not taken charge of and he was not dispossessed. Only a notice of the attachment was posted in English on the premises, which was situated in the midst of a Spanish speaking people. "It was in English," says Gonzalez (Rec., 67), "but I found out *after inquiry* that it referred to an attachment."

A simple motion to vacate the attachment on the

technical ground that was afterwards raised in a suit in equity by a stranger to the attachment record, would promptly have terminated the proceeding and have resulted in the removal of the notice. And the defendant in error would have been able to have recovered his losses and damages at once in that proceeding as is more fully pointed out later in these pages. But he made no such motion, leaving it to a third person to take the steps necessary to dispose of the case.

As to the damages claimed to have been suffered by the defendant in error, there is some testimony—not explained in detail or with exactness—as to extraordinary fees paid to lawyers "*and for a great many other things*" (Rec., 46)—not explained—in connection with his defense. He also testified to traveling expenses back and forth through the island while preparing his defense, amounting in all to the sum of 1200 *pesos*. It is apparent, however, that the case proceeded in the court below on the theory that the gravamen of the action, in the mind of the defendant in error, was the alleged damage to his reputation and credit resulting from the attachment against him. And as to this issue there was practically no evidence to sustain the verdict; or as said on the motion for a new trial (Rec., 24), "the verdict of the jury has no evidence to support it and is so far contrary to the evidence as to shock the moral sense."

It is not to be expected that this court will examine this record with a view to the reversal of the judgment on the ground that the verdict is not supported by the evidence. But as indicating the general char-

acter of the result attained by the operation of a court of justice in this case, the writer ventures to summarize briefly the evidence offered by the defendant in error.

Mr. Bravo (Rec., 59) simply expressed the opinion that "a case like that" always affects a merchant "in some way or other." Mr. Koberg, when asked whether the credit of the defendant in error had been hurt seriously or slightly, replied, "I cannot say that. I do not know that." (Rec., 62.) Mr. Phillipi several times stated that the credit of the defendant in error was *not* hurt by the attachment suit (Rec., 63), and even when pressed by counsel he stated that he did not know whether it was affected or not and that he had no opinion on the question. (Rec., 64.) The witness Koester said that his credit was hurt "just to a certain extent," but he was not able to state how much. (Rec., 65.) Mr. Font said that he was a doctor and not a merchant and did not know about such matters; but his "understanding" was that an attachment against a merchant must injure his credit. Our friend Gonzalez saw the notice on the house. (Rec., 67.) It was in English, and as he was of an inquisitive turn of mind, he took steps to ascertain its meaning and learned that it referred to an attachment. But he did not venture any opinion as to its effect upon the credit and standing of the defendant in error. Mr. Ramos, when asked whether the attachment affected the credit and standing of the defendant in error, said, "I do not know, I cannot say." (Rec., 68.) When recalled in order again to testify on the same point, he said (Rec., 71): "I consider that

he *must* have suffered, because when a man has his property attached necessarily he suffers in his credit. I cannot state the amount of the harm done." And Mr. Ramos was a close business associate of Perez and a member of the firm to which Perez belonged. It was upon the house where this firm was doing business that the attachment notice was posted.

These witnesses were all called by the defendant in error and no other witness testified for him on this point or on any other point. The defendant in error himself said, in relation to the alleged injury to his credit, that his partnership was not injured because it never asked for credit. As to himself (Rec., 43) he said: "It is positive that my credit suffered greatly." But the only instance that he is able to give as a proof of the assertion is, that he wrote one Villamil & Co. for a loan of $2,000 and never got an answer. (*id.*) But he admits that he never was personally refused credit by anyone. After the Spanish speaking neighbors saw the English notice on the house, he says, "*I did not dare ask anybody*" for credit. (Rec., 43.) The attachment did not result in the presentation of bills and claims against him by his creditors. He says: "They did nothing, *but they were doubtful.*" (Rec., 50.) But the firm of Fritze, Lundt & Co. did collect a note *from his partner* that had long been overdue and unpaid. (Rec., 50.)

The record is bare of any other proof tending to show that the attachment did any harm to the good name or to the credit and standing of the defendant in error. And this court will not overlook the fact that the attachment was dissolved and the case dis-

missed not because it had been wrongfully issued—the debt was due from the defendant in error and he had by mortgage on all his real estate secured another large creditor to the exclusion of the estate of Barros—but only because of a technical incompetency on the part of the plaintiff to bring suit in Porto Rico.

I.

THE LOCAL JURISPRUDENCE WAS DISREGARDED BY THE COURT BELOW.

The original action in attachment was instituted, as heretofore stated, before a military court established by the military authorities then in possession of the island.

While the pleadings and orders in that court in that proceeding bear some resemblance in form to common law pleadings and orders, nevertheless that court proceeded in general conformity with the Spanish law relating to attachments. And it was exercising a jurisdiction that did exist under the Spanish codes.

But later the government of the island and its people was withdrawn from the military authorities and entrusted to civil authorities. A civil government was created for Porto Rico by the congress, and a civil court—the United States District Court for the District of Porto Rico—was established. Under the laws upon which the federal judicial system is established as well as under the statute creating that particular federal court, the local laws, pleading and practice were entitled to full recognition in the new court. The spirit,

as well as the express language of the statutes, required this. And in view of the fact that this government and that court were dealing with a people speaking a foreign language, it was especially the right of that people to have their affairs administered and justice done between them according to their own laws, which were accessible to them in law books in their own language, and made accessible to the federal court by official translations promptly published by the federal government.

The new civil government was established by the act of April 12, 1900. Section 8 provides in substance that the laws and ordinances of Porto Rico then in force should continue in force so far as they were not inconsistent or in conflict with the laws of the United States not locally inapplicable.

Section 34 created the United States District Court for the District of Porto Rico, and in addition to the ordinary jurisdiction of district courts gave it the jurisdiction of circuit courts, and provided that it "shall proceed therein in the same manner as a circuit court."

Section 914 of the Revised Statutes of the United States provides that:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The language of the Act of August 13, 1888, is:

> "That the Circuit Courts of the United States shall have original cognizance *concurrent* with the courts of the several states, of all suits of a civil nature, at common law or in equity."

The result of these provisions of law seems to leave the federal court in Porto Rico, so far as the local laws are concerned, exactly in the position of a circuit court of the United States sitting in a state. In other words, the local laws are the general basis of its jurisdiction, except in matters of an equitable nature. And the local practice and pleading ought to control in its administration of justice so far as that may be possible. In other words, while the Foraker Act did create a new court for Porto Rico, it did not enact for it a new code of laws. The new court, even though a federal court, could no more get along outside the local system of laws than could the local courts. It could administer justice, except in matters of an equitable nature, only according to the modes and actions provided in the local law.

In *Baltimore & Ohio Ry. Co.* v. *Hamilton*, 16 Fed., 181, the railroad company brought an action in replevin to recover the possession of certain rolling stock. It filed with the clerk of the United States Court for the Western District of Virginia such a bond as would be required in states in which the action in replevin is recognized by the laws. The clerk thereupon issued a writ of replevin. The defendant then moved to quash the writ on the ground that under the laws of Virginia there was no such form of action. The court says (p. 182):

> "In looking at this fact it appears that as early

as 1823 Virginia abolished this old common-law form of action for all purposes except cases of distress for rent, and in 1849 abolished it altogether, and for all purposes. There is no vestige of a case in replevin on the docket of this court, nor is there at Richmond, so far as inquiry can determine. The law of the United States requires (Section 914, Rev. St.) that the courts of the United States shall conform their forms and modes of proceeding to such as in like cases are the forms and modes of proceeding in the courts of record in the state where the United States court is sitting.

Now, in a like case, that is, in a case where a person is complained of for taking possession of and holding the chattels of another wrongfully, the courts of Virginia are not permitted to give the writ of replevin to a plaintiff to remedy his wrong; and as we must follow their form and mode of proceeding in such a case, we are not at liberty to issue that writ, but must follow the state's form and mode, whatever they may be."

In the action of trespass on the case subsequently brought in the new civil court by Perez against Fernandez to recover the damages claimed by Perez by reason of the alleged wrongful attachment by Fernandez against him, that court proceeded to a judgment against the plaintiff in error in disregard not only of the local laws in force governing the pleading and practice in courts, but in disregard of the substantive law of the island. There was not only no such conformity to the local pleading and practice as the law required, but there was no effort at conformity. The pleadings, service papers, orders and judgment conform to the forms in use in common law states. The action was designated on the pleadings as "trespass on the case," a form of action unknown to the Spanish laws. The declaration involves the principles of the

common law. The trial proceeded in the endeavor to conform to the rules of evidence at common law. And the court, in his instructions to the jury, all of whom (Rec., 9), with two exceptions, were Porto Ricans, discussed the case and the questions of law arising out of it, upon theories and principles that are to be found, not in the Spanish jurisprudence, but in text books and decisions relating to the common law of England.

The local system of laws, practice and pleading was absolutely ignored. Other records in this court doubtless show, as is the fact, that the lower court pays little heed to the local jurisprudence and that the relations and respective rights of litigants that come before it in civil actions are adjusted in accordance with the theories of a system of law that is not known to the people of that island. This record shows (p. 16) that the court below has entertained actions in replevin. Other official publications of Porto Rico show that it issues writs of garnishment. (1 Op. Atty.-Genl. of P. R., 159.) Neither writ is authorized by the local law, although it provides ample means for accomplishing the same results. Discussions of questions of Spanish jurisprudence, if they take place at all, are of infrequent occurrence in that court. In this particular case, in which two Spaniards had their rights adjusted upon the principles of the common law with which they were not familiar, the local law is not referred to in any form from cover to cover of the record.

As pointed out on the original brief for the defendant in error, one result of this attitude of the federal court in Porto Rico towards the local jurisprudence is that the native lawyers are debarred from practice

in that court. This is an intolerable hardship, and it is a condition from which they should be relieved by some timely announcement from this court. One result to this plaintiff in error was that the statute of limitations, which had run almost a year before this action was commenced, (Civil Code, Art. 1968), was not pleaded in his behalf, a result undoubtedly due to the fact that the American lawyers accustomed to the enforcement of the common law in that court have not deemed it necessary to familiarize themselves with the local law. And the Porto Rican lawyers who do know the local law but do not know the common law cannot practice in that court at all. Between them the plain rights of the plaintiff in error were sacrificed, if, as the plaintiff in error denies, the action below was well brought at all.

There is a growing feeling in the island that the local institutions and laws are not respected as they should be. This discontent is finding expression in public protests, and it seems essential that there should be a more careful scrutiny of the management of insular affairs in the judicial as well as in the other departments of the local government. The federal judicial system with its large and unusual powers is not readily understood by people trained under other forms of government. And the difficulty of understanding it is obviously largely increased when its adjudications proceed along the lines of an unwritten law among a people who are accustomed to the written codes of the civil law.

Not only is the action of trespass on the case a form of action unknown to the Spanish codes, but the sub-

ject matter of the action brought against the plaintiff in error in that court involved a claim that could not have been enforced against him under the local law. The lower court not only assumed jurisdiction in an action that was not authorized by law but it gave the defendant in error a remedy that did not exist under the law. In other words, it exercised a jurisdiction that did not belong to it.

No objection was made in the court below either to the form of the action or to the jurisdiction of the court to act upon the subject matter of it. No exceptions in that behalf were preserved on the record nor was error assigned in that connection. The question, therefore, arises whether the lack of jurisdiction in the court below to entertain such an action, suggested in this court for the first time, may now be considered. And this brings us to the first question propounded by the court in its order of December 5, 1904.

II.

CAN THIS COURT ON THE RECORD OF THIS CASE PROPERLY CONSIDER AND DETERMINE THE CONTENTION OF PLAINTIFF IN ERROR THAT A CIVIL ACTION LIKE THE PRESENT ONE WAS AT THE DATE OF THE ATTACHMENT AND THE COMMENCEMENT OF THIS ACTION UNKNOWN TO AND UNAUTHORIZED BY THE LAW AND JURISPRUDENCE OF PORTO RICO?

In the preceding pages and those that follow it has been shown that the lower court in the consideration of the case presented by this record assumed jurisdiction on the theory that the pleadings presented a right at

common law which it could properly proceed to try according to the common law. It has also been shown that no such right existed under the local law apart from and independently of the original attachment proceeding, and that the right to enforce such a demand as the plaintiff below endeavored to enforce existed only as an incident to and as a part of the original action in attachment, that remedy being exclusive of all other remedies.

If these points have been demonstrated, as is believed to be the case, then it follows that the lower court assumed jurisdiction in this case of a cause of action that was not authorized by the local system of laws and that could not have been enforced in the local courts. It therefore had no legal existence, and could not be enforced in the United States District Court for the District of Porto Rico, for the jurisdiction of that court is concurrent with that of the local courts. Aside from its special jurisdiction in equity and admiralty, and in controversies involving federal questions, it could not take cognizance of any right or claim that was not cognizable under the local law in the local courts or enforce any remedy not enforceable by the local courts.

If, therefore, the lack of jurisdiction was complete, as is contended in these pages, it seems to be clear that this court may now consider the question of jurisdiction and should reverse the judgment of the court below upon the ground that that court assumed jurisdiction where none existed and granted a remedy without legal warrant.

In *Campbell* v. *Porter*, 162 U. S., 478, the question was of the sufficiency of a codicil to devise or dispose

of real estate. Whether the orphans' court had jurisdiction to try any such question had not been raised either on the briefs of counsel or in the opinion of the lower court. It was raised for the first time on the briefs of counsel in the Supreme Court of the United States. The court, speaking by Mr. Justice Gray, said (p. 482):

> "A more serious question of jurisdiction, presented by this record, is whether the Supreme Court of the District of Columbia had power to admit a will or codicil to probate as a devise of real estate. Curiously enough, it is the plaintiff in error who contends that it had, and the defendants in error who insists that it had not. But it is immaterial by which party the question is made, for being a question of jurisdiction, it would be the duty of this court of its own motion to take notice of it."

It was held that the Supreme Court of the District of Columbia, upon the application for probate of the codicil in question, had no authority to determine upon its sufficiency to pass real estate, and its order was accordingly reversed.

Although not a court of last resort, a clear and terse expression of the rule which seems to control in such cases, will be found in *Nigh* v. *Dovel*, 84 Ill. App., 228. Here the question, not preserved on the bill of exceptions or presented in the lower court, was as to the jurisdiction of a justice of the peace of a claim exceeding $200. The court, although it found that the claim did not exceed $200 as contended, on the general question said:

> "The want of jurisdiction urged in this case was not jurisdiction of the parties, but jurisdiction of the subject matter. Want of jurisdiction of a sub-

> ject matter over which, under the law, a court has no jurisdiction, may be suggested to the court at any time and in any manner that will call the attention of the court to such fact; or if it occurs to the mind of the court at any stage of the proceedings even without suggestion, then it is the duty of the court, whether moved to do so or not, to at once dismiss the case."

In the case now before this court the damages for a wrongful attachment could only be awarded in the attachment proceeding itself. The lack of jurisdiction in the lower court to entertain such a claim for damages was quite as fundamental as would have been the lack of jurisdiction of the justice court over a claim exceeding $200, or as was that of the orphans' court to pass upon the sufficiency of a codicil to pass real estate. In each case the lower court dealt judicially with a subject matter over which jurisdiction vested by law in another court.

In *Thompson* v. *Railroad Companies*, 6 Wall., 134, the point was that the complainant had a plain and adequate remedy at law and therefore the court of equity had no jurisdiction. The appellees urged that "where a case is supposed to be not cognizable in a court of equity, the objection should be interposed in the first instance. After suit has been regularly heard below upon its merits, the objection comes too late."

Mr. Justice Davis, in an opinion reversing the decree of the lower court, said:

> "Usually, where a case is not cognizable in a court of equity, the objection is interposed in the first instance, *but if a plain defect of jurisdiction* appears at the hearing, *or on appeal*, a court of equity will not make a decree."

In *Allen* v. *Pullman Palace Car Co.*, 139 U. S., 658, it was held that a decree granting an injunction will be reversed where a court of equity had no jurisdiction in the premises, though the question was raised for the first time on appeal.

In *Parker* v. *Ormsby*, 141 U. S., 81, in which the question of jurisdiction because of the lack of requisite citizenship, had not been suggested in the lower court, but was first raised in this court on appeal, Mr. Justice Harlan said, page 86:

> "The motion to dismiss the appeal necessarily assumes that it was competent for the appellants by their acts, *or by failing to act*, to waive the question of jurisdiction of the Circuit Court. This is an error. We said in *Metcalf* v. *Watertown*, 128 U. S., 586, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here, upon error or appeal, is a question that this court must examine and determine even if the parties forbear to make it, or consent that the case be considered upon its merits."

In *Mansfield, &c., Ry. Co.* v. *Swan*, 111 U. S., 379, the question arose as to the jurisdiction of the lower court, when the necessary citizenship of the parties did not appear in the record. In deciding that such citizenship must appear affirmatively from the record this court speaking by Mr. Justice Matthews said (page 382):

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is in-

flexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Manifestly this must be the law, else disastrous judicial confusion would ensue. The law only, and not either the consent or the inadvertence of the parties, ought to mark the limits of the jurisdiction of the court and determine what rights may be adjudicated and what remedies enforced in it. Neither the failure of the parties to raise the question of jurisdiction in the lower court, nor the failure of the lower court to pass upon it, should be permitted to tie the hands of an appellate court and thus compel it in the face of the law to affirm a judgment entered in a case of which by law the lower court had no jurisdiction.

In *United States* v. *Ruckabee*, 16 Wall., 414, there is nothing in the opinion or in the briefs of counsel to show that the question of the jurisdiction of the lower court was ever raised before the case was taken to the Supreme Court of the United States. But the decree was there reversed for lack of jurisdiction in the court below; and this was done at the suggestion of the plaintiffs and to their advantage, although they had set the lower court in motion. And the reasoning of

the court shows that it is not essential that the lower court shall have considered the question.

In *Fiester* v. *Shepard*, 92 N. Y., 251, where, upon issue joined upon a petition to require an executor to render account of his official acts and an answer denying the allegations of the petition, an order had been entered by the lower court requiring the executor to show cause why he should not pay the residue of the estate to the petitioner, the Court of Appeals of New York, speaking by Ruger, Ch. J., said:

> "The point is now made by the executor that the surrogate had no power to entertain this proceeding and adjudicate upon the question presented by the petition, that being the only question tried by him. We believe the point is well taken.
>
> Although so far as the record shows this objection was neither raised in the Surrogate's Court nor at the General Term, yet as it lies at the foundation of the proceeding and concerns the jurisdiction of the Surrogate over the subject-matter of the controversy, *it is effectual and may be taken at any stage of the proceeding and must be considered and disposed of when raised.*"

Fowler v. *Eddy*, 110 Pa. St., 117, was a case in which a recorder had adjudged that rent was due by Fowler to Eddy. Upon a writ of certiorari to the court of common pleas it was argued that under the statute then in force the recorder had no jurisdiction to enter a judgment. This objection was overruled and the judgment of the recorder was affirmed. The defendant took a writ of error and the Supreme Court in holding that the recorder had no jurisdiction, said:

> "This judgment being invalid by reason of no jurisdiction in the court which pronounced it, it

cannot support the execution issued thereon, and the court erred in not reversing the judgment. *It is never too late to attack a judgment for want of jurisdiction.*"

Fairfax Forest Min. & Mfg. Co. v. *Chambers*, 75 Md., 604, was a suit in assumpsit under a special contract. In the course of the opinion, Robinson, J., said:

> "And this brings us to the question of jurisdiction, a question *not made in the court below, but made for the first time on this appeal.* * * * *It can hardly be necessary to say that a judgment rendered without jurisdiction of the parties or subject-matter* is a void judgment, and that objection to the jurisdiction may be made in the court below, or *it may be made for the first time on appeal*, for the reason that such a judgment is a nullity."

Forsyth v. *Hammond*, 142 Ind., 505, was a suit growing out of a proceeding by the board of county commissioners to annex territory to the City of Hammond. On a petition for rehearing in the Supreme Court, Howard, Ch. J., said:

> "One of the positions taken by counsel in support of their petition for a rehearing of this case is that the circuit court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial function, and as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. The proposition so advanced *was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, it is one that will be entertained at any time.*"

To put it in a concrete form the point in all these

cases is that the lower courts, under the law, did not have the power to do what they did do. It is not a question of form, but of substance. They were not authorized by law to enter the decree that was entered or to render the judgment that was rendered, because they had no jurisdiction over the subject matter. Such jurisdiction rested either in other courts than the ones that acted or did not exist at all. They did what they could not do and the upper courts held that they could not do what they did do.

The rule announced in these citations seems to be entirely applicable to the case presented on this record. And if it be true, as here contended, that the right of the defendant Perez to recover damages against Fernandez for the wrongful attachment, could only be enforced under the local law in and as a part of the original attachment proceeding, it is difficult to see how the judgment for such damages by another court in a separate proceeding can stand. The jurisdiction of the court to render such a judgment or to entertain the subject matter of such an action is now suggested and denied. Under the authorities cited it is submitted that this court can and must now pass upon it.

If a record should come to this court from which it appeared that a circuit court of the United States had taken jurisdiction of a cause in admiralty or a matter of bankruptcy, or of any other case of which by law the district courts of the United States have exclusive jurisdiction, it is believed that this court would not hesitate on its own motion to deny the jurisdiction of the lower court even though the question had not been properly reserved on the record or suggested by counsel. It is

difficult to see how such a case can readily be distinguished from the case presented by this record. If, as here contended, the only remedy open to the defendant in error was the presentation of his claim for damages in the action in attachment, manifestly the court having jurisdiction of the action itself would also have exclusive jurisdiction of the claim for damages. But the record shows that notwithstanding the fact that the law vested exclusive jurisdiction in that court, another court has assumed jurisdiction and has acted. The fact being suggested to this court, it is difficult to see how it can avoid holding that the lower court was without authority to enter such a judgment. The same theory would seem to control the other phase of this case. The laws of the island, of which this court will take judicial notice, exclude the exercise of a common law jurisdiction. Notwithstanding this fact the record shows that the lower court in this case did exercise such a jurisdiction and did adjudicate the rights of the parties to the action in accordance with the common law and in utter and complete disregard of the local law. If therefore this court would not hesitate, as it has not in many previous cases, to hold that the wrong court had exercised jurisdiction in a given case, it ought not, as is submitted, to hesitate to hold that a court in this case has exercised a wrong jurisdiction, a jurisdiction foreign and unknown to the laws of Porto Rico.

III.

WAS A CIVIL ACTION LIKE THE PRESENT ONE KNOWN TO THE LAWS AND JURISPRUDENCE OF PORTO RICO AT THE TIME THE ATTACHMENT IN QUESTION WAS SUED OUT?

When one has not lived under a foreign system of laws and has not practiced under it as a lawyer and thus had an opportunity to absorb its traditions, it is not always a simple matter to grasp and understand its spirit and full scope. And therefore the writer, who has had some personal experience with the Spanish laws relating to public rights, but a very limited contact with the laws relating to private rights, finds himself unable to explain with any satisfaction to himself, and much less to the satisfaction of this court, the exact scope and limits of the remedies provided in the Spanish jurisprudence for the redress of wrongs that are independent of contract. He has observed, however, that the Spanish courts are appealed to in that class of cases with a notable infrequency. Decisions in action in tort, as we call them, occupy a small place in their reports. Rights and remedies of that kind occupy a still less important place in their text books. In his work in the civil law of Spain Sanchez Roman apparently says all that he has to say on wrongs independent of contract in less than one printed page (Vol. 4, p. 1017). He dismisses the question of malicious wrongs such as assaults, etc., and the civil liability arising out of them with the mere statement (*id.*) that they are fully explained in the *penal* code. Falcon in his annotations of the civil code gets through with the subject in three and a half pages (p. 429) without say-

ing anything that throws light on the matter to a student of law with common law antecedents. All this led the writer in his original brief to say, with a proper disclaimer of any special learning on the question (p. 26), that the law of torts as a branch of purely civil remedial justice had a limited application in the Spanish jurisprudence, although there was a modified recognition of the principle that a wrong done creates an obligation to recompense the person injured. This impression of this phase of the Spanish law had been strengthened when natives who had suffered personal injuries went into the United States District Court for the District of Porto Rico to recover damages instead of going into their own local courts. The general experience is that in cases of that class more liberal results are obtainable in the local courts than in the federal courts. And it is the general practice for plaintiffs in such cases to seek the jurisdiction of local courts. This very record cannot fail to evoke the inquiry why a Spanish speaking person should resort to the federal court rather than to the insular court in order to enforce rights against another Spanish speaking person. Every consideration would suggest an appeal in such a case to the insular courts where both the litigants and their witnesses could be understood without interpreters.

The explanation of these matters lies in the fact that the federal court of Porto Rico has not been administering the local laws as required by the fundamental principles upon which the federal system is based, and that results could be arrived at there that could not be arrived at in the insular courts.

It is true that decisions are to be found in the Spanish reports that on their face have the general appearance of actions in tort. But apparently they do not proceed on the lines of such actions in our courts, either with respect to the character of the evidence admitted, the elements that go to make up the claim of damages or in the amount of damages awarded. The writer is not prepared to enter upon any disquisition showing just how such actions differ from our actions of tort, but that the views here expressed are not his personal views only, will sufficiently appear by reference to an article in the Review of Reviews for September, 1905, by the Hon. Charles Sumner Lobingier, an American judge of the Court of First Instance in the Philippines. The article is entitled "Blending Legal Systems in the Philippines." Manifestly Judge Lobingier, sitting in a trial court of general jurisdiction, has ample opportunity for observing and knowing exactly what the state of the law is. After speaking of the conservatism of the American government there in modifying and changing the substantive law of the island, he says (p. 337):

> "Certain additions have been made in the form of acts of the Philippine Commission as by enacting new libel and trade-mark laws providing, *inter alia*, for *civil* actions based thereon. *The Spanish law, it may be remarked, has no department corresponding exactly to what in the English law is designated by the term 'torts'*—*i. e.*, wrongs independent of contract and redressed by a *civil action* as opposed to a *criminal prosecution*. Doubtless the deficiencies of the Spanish law in this regard will require considerable similar legislation in the future. But the existing codes of substantive law, so far as they go, remain, meanwhile, practically unimpaired."

This reference to the criminal prosecution as a means of recovering civil damages for wrongs that are independent of contract is illustrated by the fact that practically every conviction is accompanied by a judgment for civil damages. Article 16 of the *penal* code provides that "every person criminally liable for a crime or misdemeanor is also civilly liable." In Article 613 of the same penal code civil liability by criminal process is also attached to

> "Those who through mere *imprudence or negligence*, without committing a violation of the regulations, shall cause an injury, which, *if done with malice*, would constitute a crime or misdemeanor."

With respect to wrongs against property the criminal code provides in Article 627:

> "Those who intentionally *or through negligence or carelessness* shall cause any damage whatsoever, not punished in this or in the preceding books, shall be punished with a fine, etc."

But even if the writer were competent to undertake the task, it would not be necessary at this time to enter upon a close analysis of the Spanish law for the purpose of ascertaining just what civil damages are recoverable in criminal prosecutions and what in civil proceedings. It will suffice if it can be discovered under what provision of the civil law the action on this record could have been entertained.

As the cause of action below was pleaded and tried malice was the gist of it. The instructions to the jury were also based on the theory that proof of malice was essential to a recovery, and that, if not actually proved, it might be implied if there was no probable cause for

the attachment. In other words a common law *cause of action* was set up and a common law remedy invoked and adjudged.

Under the Spanish laws the only general remedy for recovering damages by civil action is mentioned in two, and only two, articles of the civil code so far as the writer has discovered. There are some special remedies in special cases, such as the special remedy hereafter referred to for recovering damages upon the vacation of an attachment. The general provision is found in Articles 1101 and 1902. The first article has no application because the defendant below was clearly not "fulfilling an obligation" to the plaintiff in levying an attachment against his property. Article 1902 is as follows:

> "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage done."

The plaintiff in error was neither at fault nor was he negligent in bringing the attachment suit against the defendant Perez, and there was no endeavor to prove that he was. The act complained of in the declaration is set up as a wanton, willful and "malicious" act, not as a negligent act. This was the cause of action claimed by the plaintiff below, and it was for such a cause of action, the motive of which was malice, that the court granted a civil remedy in damages.

Clearly the alleged *malicious* act of Fernandez in levying an attachment against Perez was not a *negligent* act. What is done wantonly and in malice cannot be said to have been done negligently. Negligence im-

plies mere inadvertence, while malice implies deliberate evil intention. "Fault" as used in Article 1902 is the English for the Spanish "culpa." It is clearly not malice, for which the Spanish have the word "malicia". "Culpa" may imply intent with respect to the act, but not an evil purpose with respect to the result of the act. Malice implies both.

Sr. Sanchez Roman in his Civil Law (4th Vol., p. 1017), in treating of Article 1902, refers for a definition of "culpa" as there used, to what he has said of the same word as used in the articles of the Civil Code that provide an action for damages for wrongs arising out of contract. In the latter connection (p. 278), he says that volition, in the act or omission that causes the loss or damage, is characteristic of "culpa" just as it is of fraud; but that with respect to the damage done, it lacks the element of intention that is present in fraud. That is to say, as he puts it, "culpa" is lacking in the deliberate purpose to cause damage or loss as is the case in fraud. He then proceeds to say that "culpa" signifies a voluntary act or omission, the result of which is the non-fulfillment of the obligation; but that this non-fulfillment *does not have for its motive the intent to cause damage.*" The loss and damage which necessarily results to another from "culpa" or fault, is not considered by the person when the act which constitutes the fault is done or left undone. The author concludes this definition of fault or "culpa" by saying that it is not the intent, in "culpa," to do damage, that gives rise to the liability, as in a case of fraud, but it is the *lack of diligence* which may occur

in the improper act or omission to act.[1] The same author (p. 281), considers that *intent* to cause the loss or damage would turn the act into a fraud or crime.[2]

Falcon in his fourth volume on the Civil Code (p. 431), in commenting on Article 1902 and as being embraced within it, refers to the "damages which are daily caused to persons and property by imprudence, stupidity, bad judgment and negligence, that is to say, by fault or omission,"[3] thus wholly excluding malicious acts from consideration as acts for which civil damages may be recovered under that provision of law.

It thus appears that the alleged malicious act of the plaintiff in error out of which the defendant in error claims the right to recover damages is not such an act as is contemplated under Article 1902, which seems to be the only general provision in the civil code under which a person may recover civil damages arising from wrongs not related to contract. Under that article an act *not malicious* may give rise to an action for damages

[1] Es caracter de su naturaleza, como en el dolo, la nota de *voluntaria*, en la accion u omision causantes del dano o del perjuicio, pero le falta el elemento *intencional* del dolo, en relacion directa con el perjuicio mismo, o sea el deliberado proposito de perjudicar o danar, que en el dolo es indespensable. La culpa representa una accion u omision plenamente voluntarias, por las cuales resulta incumplida una obligacion, pero este incumplimiento no tuvo por movil el proposito de perjudicar ni se tuvieron en cuenta, al realizarse la accion u omision constitutivas de la culpa, las consecuencias danosas o perjudiciales para el derecho de otro, que la misma habia de producir.

En suma, no es la voluntad de perjudicar lo que origina la responsabilidad, como en el dolo; es la falta de diligencia que puede consistir en accion u omision indebidas—culpa *in faciendo*, culpa *in non faciendo*.

[2] Que este incumplimiento sea involuntario, con un fondo de negligencia en la accion o en la omision origen del incumplimiento, pero sin que tenga la nota de intencional, deliberado o fraudulento, para causar el dano o el perjucio que de el resulte; en cuyo caso ya hemos dicho constituiria la nocion del dolo o de un delito.

[3] Los danos y perjucios que a las personas y a las propiedades se causan diariamente por imprudencia, torpeza, mala direccion y negligencia, es decir, por culpa u omision.

of the limited and concrete character required in the Spanish law. But if, as is denied, a wrongful attachment can ever sustain a civil action for damages, it is insisted that it could not be so sustained as a malicious act. The plaintiff below has claimed rights arising out of a malicious act and as such apparently the jurisdiction was in the criminal court and not in the civil court.

Now a word with reference to the proof offered by the plaintiff below in support of his contention. Attention has already been called to its character, extraordinary in that to a singular extent it fails to show that the plaintiff suffered any damage at all (*vide*, pp. 8 and 9).

In this connection it was said on the original brief for plaintiff in error (p. 26):

> "It is believed, however, that it will be found to be a well settled doctrine in the Spanish jurisprudence, that damages may be recovered in an exclusively *civil* action only when the injury done is of a *material* character capable of being *definitely valued*, and then only when it is the immediate and necessary result of the negligence or wrongful act complained of. In such a case the damage must be '*repaired*.' In plain English it must be 'made good.'"

Interesting examples of this rule may be found. In the *Decision of December 6, 1882*, the Supreme Court of Spain held, in an action to enforce civil responsibility for criminal attack upon the honor of the plaintiff, that a man's honor could not be valued and that it was impossible to fix the amount of the damages.

The essential principle in all the Spanish cases is that damages must be definitely proved in all cases.

In the *Decision of June 25, 1880*, 43 Jurisp. Civil,[4] p. 772, the court, referring to its previous decisions, says that "the legal doctrine sanctioned by this court relating to what is essential to the recovery of damages is that they be *fixed* and *proved* in a *positive* and *concrete* manner."[5]

In the *Decision of September 30, 1898*, 84 Jurisp. Civil, 795, it is said that (p. 806):

> "It is a doctrine constantly recognized and announced by this court that every condemnation for losses and damages must be preceded by ample proof of the *reality* and *existence* of the losses and damages demanded."[6]

As to the character of the evidence, it may be said that it was the duty of the plaintiff in error to reserve proper exceptions on the trial. That is true. But this reference to the Spanish law relating to the character and extent of proof necessary to establish the right to recover damages has a more fundamental purpose. The point that the writer seeks to emphasize is that the record shows a wide departure by the lower court, in the matter of evidence as well as in all other phases of this litigation, from the local law. He was enforcing, in other words, the common law of England, and not the laws of the island.

[4] The decisions of the Supreme Court of Spain are identified not by the names of the parties litigant but by the date on which the decision was rendered. The references are to a series of volumes called "Jurisprudencia Civil," now aggregating about 95 in number, which contain the decisions of that court.

[5] "la doctrina legal sancionada por el Tribunal Supremo relativa a que es condicion esencial para la reclamacion de perjuicios el fijarlos y perbarlos de un modo positivo y concreto."

[6] "siendo doctrina constantemente reconocida y declarada por este Tribunal Supremo que a toda condena de danos y perjuicios * * * ha de preceder justificacion bastante de la realidad y existencia de los danos y perjuicios que se demanden."

In responding then to this third proposition propounded by the court it is insisted:

1. That the right of action claimed by Perez against Fernandez was a right of action recognized in the common law but not in the law then in force in Porto Rico.

2. That such a claim for damages, based on malice on the part of Fernandez, could not have been enforced in a civil action under the local law.

3. That the only remedy open to the defendant in error was the remedy provided by law in the attachment proceeding which, as shown in the subsequent pages, was exclusive of every other remedy.

IV.

THE DAMAGES AWARDED IN THIS ACTION OF TRESPASS ON THE CASE COULD HAVE BEEN ASSESSED IN THE ORIGINAL ATTACHMENT PROCEEDING.

In the Spanish law an attachment is called an "embargo preventivo" which may be translated as a "provisional seizure" or as an attachment. In substance, the Spanish action in attachment and the form and manner in which it must proceed are very similar to the action in attachment with which American lawyers are familiar.

The Spanish law in relation to provisional seizures or attachments is found in Title XIV of the Code of Civil Procedure.[7] Its general provisions are as follows:

[7]This code, as well as the other Spanish codes in force in Cuba and Porto Rico, have been translated into English by the War Department, and have been published at the government printing office. And the citations in these pages are to these official translations.

When the claim exceeds 1,000 *pesetas* the district judge has jurisdiction to order an attachment; when it does not exceed that amount the jurisdiction rests with the municipal judge. (Art. 1395.) An attachment may be ordered (Art. 1398) when the debt is evidenced in writing and any one of the following conditions exist: If the debtor be a foreigner; or if, being a citizen, he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded. It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business leaving no one in charge, or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors.

As in the case of our own attachment acts, a provisional seizure may be ordered (Art. 1410) at the same time the action to recover the debt is instituted, or afterward in aid of an action already instituted, if the proper showing be made. After the seizure has been made the plaintiff must within twenty days file his declaration or statement of his demand (Art. 1409). Should he fail to do so the attachment will be annulled. If the debtor whose property has been seized requests it, the plaintiff must file his declaration or statement of claim within ten days (Art. 1413), and upon his failure to do so the attachment must be vacated.

But unlike attachment proceedings as commonly established by legislation in the United States, the Spanish law of provisional seizure or attachment, in

force in Porto Rico at the time involved on this record, provides, in case the attachment is vacated for any cause, for an adjudication, *in the action itself*, of the claim of the defendant for damages arising out of the wrongful attachment. Title XIV of the Code of Civil Procedure contains elaborate and complete provisions for such an adjudication. (Arts. 1409, 1410, 1411, 1412, 1413, 1414 and 1415.)[8]

In Article 1410 it is provided that when an attachment is vacated by final ruling the plaintiff in attachment "shall be taxed all the costs and be adjudged to indemnify the defendant for any losses and damages he may have suffered." In Article 1413 the provision is that upon the vacation of an attachment by reason of the failure of the plaintiff when requested to file his declaration within ten days "the attachment shall be vacated and the costs, losses and damages shall be taxed against him." In Article 1411, which relates to the vacation of an attachment for certain specified causes, the provision is that "all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendant for any losses and damages he may have incurred." The same article contains another clause providing that when the attachment is vacated for any reason other than those specifically named, "the ruling thereupon shall also determine what may be proper according to the cases with re-

[8]These articles of the Code of Civil Procedure then in force in Porto Rico correspond with Articles 1411, 1412, 1413, 1414, 1415, 1416, 1417 of the Code of Civil Procedure then and now in force in Spain. Apparently some slight change in the law of Civil Procedure as authorized for the Spanish colonies, produced this variation in the numbers of the respective articles in the two codes. This difference in numbers must be borne in mind when examining the decisions of the Supreme Court at Madrid to which reference is made later in these pages.

gard to costs and the indemnification of losses and damages which may have been suffered."

In Article 1415 it is provided that when there has been an adjudication by final order against the plaintiff for the losses and damages suffered by the defendant they shall be recovered according to the procedure established in Articles 927 *et seq.* of the same code (p. 182).

The articles last referred to are embraced in Title VIII of the Code of Civil Procedure relating to the "Execution of Judgments." They provide a process by which, as an incident to the principal action, but with all due formality, the amount involved in a judgment may be ascertained. It seems that in many forms of action under the Spanish practice the first issue before the court involves questions of law and the right, upon the evidence, of one party or the other to recover. It being decided that one party is entitled to recover from the other, an issue is framed for determining the amount to be recovered. And this issue is settled by the same judge in the same action, the judgment in the principal proceeding not being final until the amount of the claim is thus liquidated. In an action in attachment, for example, the order vacating the attachment would also impose costs upon the plaintiff and condemn him to pay the defendant's losses and damages. Before this judgment could be executed it would be necessary to resort to the procedure established in Articles 927 *et seq.*, under which by proper statements or pleadings and counter pleadings an issue is arrived at and set for hearing, witnesses are called, evidence introduced, and the court after due consideration of the

record finds whether any damage has been suffered and, if so, to what amount. This finding becomes a part of the final judgment in the attachment suit.

The procedure bears a strong analogy to a suit in equity where the questions of law and of fact having been first determined and the right of the complainant to recover against the defendant having been established, the court, before entering a final decree, refers the cause to a master or hears the testimony himself, to determine and liquidate the amount to be paid. This having been determined, a final decree is then entered embracing the amount so arrived at.

Such a preliminary finding for the complainant on the law and the facts by a court in chancery is not, generally speaking, a final order and cannot be appealed from; it only becomes final when the master or the court has taken the necessary testimony to ascertain the amount due from the defendant to the complainant and has embodied it in the final decree. So there are repeated decisions by the Supreme Court at Madrid in which it is held that the preliminary order vacating the attachment and ordering the plaintiff to pay the costs and to indemnify the defendant for his losses and damages, is not final, and cannot be appealed from until the amount of the losses and damages so to be paid has been ascertained in accordance with the procedure established in Articles 927 *et seq.* of the Code of Civil Procedure.

Decision of December 4, 1901, 92 Jurisp. Civil, 550-3.

Decision of October 20, 1899, 88 *id.*, 130.

The right thus established of the defendant in an

attachment proceeding to recover from the plaintiff not only the costs but the losses and damages occasioned to him by an attachment which, for any cause has been vacated, is unquestioned in the Spanish courts. The right has been upheld in numerous decisions by the Supreme Court of Spain and apparently has never given occasion for any question of doubt.

In a controversy between Don José Gamero y Porras, a professor in the naval academy at Manila, and Dionisio de las Cajigas y Hernandez, a citizen of the same place, a promissory note was involved which purported to be signed by the defendant. But Cajigas denied his signature on the document under conditions that led the plaintiff to assert with some vehemence that he was lacking in good faith and was simply endeavoring to elude his just obligations. Whatever may have been the real facts in the case, the plaintiff was unable to prove the signature to be the genuine signature of the defendant, and the attachment that he had caused to be levied on the latter's property was therefore vacated. The result was that besides losing his claim against the defendant he was adjudged, in the attachment action itself, to pay not only the costs of the proceeding but the losses and damages which the defendant succeeded in proving that he had suffered. The plaintiff took an appeal to the Supreme Court of Spain where his main effort apparently was to get rid of the judgment that had been rendered against him for losses and damages. Although that court seems to have entertained some suspicions of the good faith of the defendant in the matter, it found itself unable to extend any aid to the plaintiff. It says:

"When a provisional seizure has been annulled be-

cause it is not embraced within the terms of Article 1382 of the law of Civil Procedure in the Philippines, the court can do no less than condemn the plaintiff in costs and to the payment of losses and damages in compliance with what is expressly ordained in Article 1394."

Decision of December 3, 1892, 72 Jurisp. Civil, 494.[*]

In a controversy between Piza Bros. and Iglesias & Co. that arose in Porto Rico concerning a small indebtedness, the plaintiffs had the misfortune of not being able to prove their claim, and so the attachment that had been levied upon the property of the defendants was vacated. But the lower court saw something in the case that seemed to justify it in not awarding the costs against the plaintiffs and in not requiring them to pay the losses and damages occasioned to the defendants by the attachment. The defendants complained on the appeal papers that, although the court had declared the attachment improper and unlawful, it nevertheless had not condemned the plaintiffs to pay the costs or to indemnify the defendants for their losses and damages as expressly ordered in the law. They insisted that under Article 1414 the court could not dispense with the formality of taxing the costs and losses and damages against the plaintiffs when it va-

[*]The text in Spanish is: Que dejandose sin efecto un embargo preventivo, por no estar comprendido en ninguno de los casos del art. 1382 de la ley de Enjuiciamiento civil de Filipinas, no puede menos de condenarse a quien lo pidio en todas las costas y a la indemnizacion de danos y perjuicios, en cumplimiento de la que terminantemente ordena el art. 1394.

It is understood that the Code of Civil Procedure formerly in force in the Philippines is substantially identical with the codes in force in Cuba and Porto Rico, except as to the numbers of the articles. The articles mentioned in the above quotation are undoubtedly identical with articles 1408 and 1410 of the Porto Rican Code.

cated the attachment. The Supreme Court at Madrid concurred in this view and reversed the sentence.[10]

Decision of November 6, 1888, 64 Jurisp. Civil, 538.

An earlier case is the *Decision of April 24, 1861*, 8 Jurisp. Civil, 267. Here the amount involved was a matter of 12,000 *reales*, to secure the payment of which a provisional seizure was made at the instance of Don Fernando Jaquete against the house of the heirs of one Don Gregorio de la Morena. Subsequently for proper cause the attachment was vacated. The court before whom the cause first came entered judgment in the action against the plaintiff for costs and for the losses and damages of the defendants. The case seems then to have gone to an intermediate appellate court, where that part of the judgment vacating the attachment was affirmed and that part condemning the plaintiff to the payment of costs and losses and damages was revoked. The defendants then appealed to the Supreme Court, which held that upon the vacation of a provisional seizure a *necessary consequence* was the condemnation of the plaintiff in costs and to the payment of the losses and damages.[11] And it ordered a rectification of the judgments below in accordance with this principle.

---

[10] In Spanish the text is as follows: "Porque reconocidos en aquella que no se ha justificado la existencia de la deuda, requisito esencial para decretar el embargo preventivo, la condenacion en todas las costas y a la indemnizacion de daños y perjuicios es un precepto expreso é ineludible de los artículos citados."

[11] The Spanish text at p. 268 is: Considerando que reconocidos en los fundamentos de la ejecutoria que en el caso actual no concurre ninguna de las circunstancias legales que autorizan el embargo preventivo, dejandole por lo mismo sin efecto, era una consecuencia necesaria la condenacion en costas y el abono de daños y perjuicios.

At the foot of page 250 of the official translation by the War Department at Washington of the Spanish Code of Civil Procedure will be found a note as follows:

> "When a provisional seizure is vacated on account of the non-attendance of any circumstances which authorize the same, *a necessary consequence* is a judgment for costs and the payment of losses and damages—*Decisions of October* 15, 1859 *and April* 24, 1876."

It will not be necessary to cite further cases in this connection. The various provisions of Title XIV for ascertaining the damages to be awarded upon the vacation of an attachment are so clear and the cases already cited, in which they have been applied, so conclusive, that, it may be assumed, the existence of such a remedy in the attachment proceeding itself will not be seriously questioned by the defendant in error.

The question then remains whether the remedy thus established is exclusive or whether there exists a remedy by a separate and independent action such as the one on this record.

V.

THE MODE PROVIDED IN TITLE XIV FOR ASCERTAINING LOSSES AND DAMAGES IN THE ATTACHMENT PROCEEDING ITSELF WAS EXCLUSIVE UNDER THE LAW THEN IN FORCE OF EVERY OTHER MODE.

The proposition that there is a remedy independ-

ent of the attachment proceeding is an affirmative one, the demonstration of which, if it be considered simply as an abstract question without reference to the fact that the plaintiff in error faces a judgment of the lower court against him, seems to be a burden resting upon the defendant in error. And the best demonstration that it does exist will be the citation of a decision of the Supreme Court of Spain to that effect. The writer has been unable to find any such case in the books that were available for examination by him. Nor has any such case been found by the Spanish lawyers in Spain, Cuba and Porto Rico whose aid has been enlisted in the investigation of this case. If the researches of counsel for the defendant in error have been more fruitful and they have discovered such a decision by the Supreme Court of Spain it will doubtless appear on their brief and the question will be answered.

But after all these years of practice under that code of civil procedure it seems rather inconceivable, if such an independent remedy exists, that instances of its application should not be found among the reported cases. And if no such decision has been found the inference would seem justly and necessarily to follow that there is no such independent remedy. Certainly it would be an anomalous incident in jurisprudence if a decision that such an independent remedy does exist under the laws of Spain should be announced for the first time by the Supreme Court of the United States.

The decisions of the Supreme Court of Spain above

cited as examples of many adjudications in which losses and damages, as well as costs, have been awarded in the attachment proceeding itself, and as a part of the final judgment in the action, indicate that the constant practice is to invoke that remedy for recovering damages for a wrongful attachment. And the absence of any decision, if learned counsel also have been unable to find a decision sustaining the right to recover such damages in a separate and independent action, would seem to indicate that the universal understanding of Spanish lawyers and judges is that there is no such remedy under the law.

The only discussion of the question that the writer has been able to find anywhere is in the commentaries on the law of civil procedure[12] by Sr. José Maria Manresa y Navarro, a text writer of the highest standing in Spain. He is understood to have been one of the codification commission that amended and compiled the code of which he treats, and his commentaries are said to be the *vade mecum* of every practicing lawyer in Spain and its former colonies.

In the edition of 1891 of this treatise the author, in discussing certain phases of the mortgage law and the form of recovering damages against one who has wrongfully encumbered or clouded the title of another of record, refers to a decision of the Supreme Court of Spain which holds that in a certain suit relating to the title of real estate, such damages are recoverable in an independent action, there being no provision in the

[12] "Comentario a la Ley de Enjuiciamiento Civil" published at Madrid

mortgage law authorizing their recovery in the same action (p. 411). He then says (p. 412):[13]

> "We do not think that this rule is applicable to attachments, because on the motion to vacate an attachment no discussion or proof of the existence of losses and damages is allowed, and because the law itself provides, in addition to this, that, when by final order of the court an attachment is vacated, the plaintiff be adjudged to pay the defendant his losses and damages, they being ascertained in the manner provided in article 1417 (1415 in Porto Rico), that is, according to the procedure provided in Article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount but of the existence of losses and damages. It follows that the court can decide on both questions *without the necessity of a new suit, which is precisely what the law has sought to avoid.*"

The very language of the Title XIV adds strength to this view, and seems to lead irresistibly to the conclusion that only in the attachment proceeding may the defendant recover damages for the wrongful act of plaintiff in causing his property to be seized.

In Article 1400 the plaintiff is required to give a bond to answer the damages and costs. In Article 1411 the provision is that when the attachment is vacated, the bond shall be canceled "and all the costs *shall* be taxed

[13] The Spanish text is: No creemos aplicable esta doctrina al caso de los embargos preventivos, porque en el procedimiento que se establece para dejarlo sin efecto, no cabe la discusion ni la prueba sobre la existencia de los danos y perjuicios, y porque la misma ley manda, a pesar de esto, que cuando por auto firme se deje sin efecto dicho embargo, se condene al actor a la indemnizacion de danos y perjuicios al demandado, haciendose estos efectivos en la forma establecida en el articulo 1417, que es por los tramites de los articulos 928 y siguientes. Estos tramites permiten la discusion y la prueba, no solo de la importancia, sino tambien de la existencia de los danos y perjuicios, si en esto se funda la oposicion, y por consiguiente, puede resolverse sobre uno y otro extremo sin necesidad de un nuevo juicio ordinario, que es precisamente lo que la ley se ha propuesto evitar.

against the plaintiff, who *shall* also be adjudged to indemnify the defendant for any losses and damages he may have incurred." The meaning is even more clear in the Spanish, where one verb takes the place of the words "be taxed" and "be adjudged" in this translation. The text is "se *condenera* al actor en todas las costas y a la indemnizacion de danos y perjuicios," which literally translated means "the plaintiff shall be condemned for all the costs and to the indemnity of the losses and damages." The final paragraph of the same article adds further strength to the contention. It provides that the costs and damages shall be adjudged *in the same order* of court by which the attachment is vacated. The Spanish is "en el auto en que asi se acuerde"—literally "in the order in which, etc." In Article 1413 the language is that "the costs, losses and damages *shall* be taxed against him." Here the damages and losses are *linked inseparably* with costs, which are ordinarily recoverable only in the action in which they are incurred and not by an independent action.

Article 1425 of the same title is still stronger. It is a part of Section 2 of that title. This section provides for an "intervention"—a sort of receivership—for taking possession of industrial and manufacturing establishments and similar going concerns pending a litigation as to their ownership. It proceeds along the general lines provided in the first section of that title for taking property on attachment and holding possession until the determination of the main action. Like an attachment, an intervention or receivership may be vacated, and, like an attachment also, when a

receivership is vacated costs, losses and damages are awarded.

The language of Article 1425 is as follows:

> "*Every* resolution vacating the intervention or canceling the security furnished *shall contain* the proper order with regard to costs and indemnification of losses and damages. The provisions of Article 1415 shall be observed for the recovery of the latter."

The Article 1415 referred to provides the manner of recovering losses and damages when an attachment is vacated.

The language of these several provisions, the cases already cited showing that it is the practice to recover damages in the attachment proceeding itself, the absence of any cases, if none have been found by counsel, upholding the right to recover in an independent action, and the very clear and definite comment of Sr. Manresa, above quoted, all seem to make conclusively for the proposition that damages of this special nature are recoverable only in the special manner thus so clearly and amply established in the law.

And it is not only proper but eminently reasonable that this should be so. Under our attachment acts a writ issues when the plaintiff has filed a proper bond with the clerk or sheriff. It is not, therefore, a judicial act. But under Spanish procedure an attachment may be made (Art. 1401) only upon the order of the court after a hearing. It is therefore, the judicial act of the court. The right of a defendant in attachment to recover against the plaintiff therefore arises not out of the mere fact that such an action has been commenced, but out of the seizure of his property ordered

by the court upon the petition and showing made by the plaintiff. The act of the court completes the defendant's right to damages when it appears from the subsequent vacation of the attachment by the court that it had been wrongfully made. Why should not the judge who ordered the attachment and subsequently ordered it vacated, and who therefore knows all the facts attending it and has heard the testimony and argument on the motions to grant and vacate, be the very judge who is most competent to pass on the question of damages? Why should the defendant be either compelled or permitted to institute another suit, with new pleadings and new service, and with its attendant delays and complications? Certainly it is a most logical disposition of law as well as most economical of the time of the courts and in cost to litigants, that the rights of the parties to an action in attachment, the costs and all the attendant and resulting obligations between the parties arising out of it, should be determined and adjusted in one final judgment by the judge by whose order the attachment was both made and vacated. And this, it is submitted, is the purpose of the provisions of Title XIV, to the exclusion of any other remedy. Says an old decision of the Supreme Court of Spain: "No hay doctrina juridica contra el texto de la ley," *Decision of October* 14, 1873—"Judicial theories have no place when contrary to the *text* of the law." Here the act of the court in ordering the attachment requested by the plaintiff was essential to give the defendant the right to recover damages against him. Certainly then it is a wise provision of law that requires and permits the court to follow its own act through to its logical

consequences, the assessment of costs and damages, and to pass on and control the rights arising out of an act in which he himself took an essential part. The law says that the matter of damages shall be settled and disposed of in the same action. That is the text of the law. Unless counsel can show by a concrete case that the Supreme Court of Spain has indulged a judicial theory contrary to this text of the law and has held that the matter of damages may be disposed of in an independent action in another court, it is submitted that this court ought not to indulge in such a theory.

The judgment of the court below should be reversed.

Respectfully submitted.

JAMES S. HARLAN,

JOHN MAYNARD HARLAN,

Attorneys for Plaintiff in Error.